Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON, *et al.*,
Petitioners,

v.

WILLIAM T. MOERSEN
Respondent.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "ministerial exception" to employment laws, which protects the First Amendment right of a church to select its ministers, applies to a church organist who selects and plays music for the church's liturgical services.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioners state that all parties to the proceedings in the Maryland Court of Appeals were:

> Archdiocese of Washington, Reverend Robert Amey, and Saint Catherine Labouré Parish, defendants;
>
> William T. Moersen, plaintiff.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

- The Roman Catholic Archbishop of Washington, a Corporation Sole, is referred to in the caption as the Archdiocese of Washington.
- Saint Catherine Labouré Parish is part of the Archdiocese of Washington and is not a legal entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Archdiocese of Washington, *et al.* respectfully petition for a writ of certiorari to review the decision and judgment entered on June 14, 2007 by the Maryland Court of Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the Maryland Court of Appeals is reported at 925 A.2d 659 (Md. 2007), and is reproduced in the Appendix ("App.") at 1a. The opinion of the Court of Special Appeals is unreported and is reproduced in the Appendix at 45a. The opinion of the Circuit Court is also unreported and is reproduced in the Appendix at 56a.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on June 14, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This appeal concerns the scope of the First Amendment right of churches to select, free from government supervision or control, those who perform ministerial or liturgical functions. The courts have long recognized that employment laws are subject to a "ministerial exception" that prohibits their application to the claims of those who seek to perform ministerial functions. The question in this case is whether the ministerial exception applies to a church's decision to terminate an organist whose duties were to select and play music at religious services—with the stated objective of "support[ing] the Gospel message through the music ministry" and "encourag[ing]" the congregation's "active . . . musical participation." App. 8a.

Respondent William Moersen was employed as an organist at St. Catherine Labouré Parish from 1958 to 1976 and then again from 1991 to 2002. From July 1, 2001 until February 17, 2002, he was employed as an organist pursuant to a written contract. On February 17, 2002, he was terminated based on his "apparent inability to work cooperatively." App. at 10a.

Moersen sued the parish, its pastor, and the Archdiocese of Washington in the Circuit Court for Prince George's County, claiming breach of contract, wrongful discharge and intentional infliction of emotional distress. In his complaint, Moersen alleged that in September 2001 he informed the pastor, Father Robert Amey, that some forty years earlier he had been sexually abused by an unidentified lay choirmaster. Moersen alleged that Father Amey offered to help pay for counseling, but that thereafter "his employment situation began to deteriorate" to the point that he was dismissed. App. 9a–10a.

The Archdiocese moved to dismiss the tort claims for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted, based on the religion guarantees of the United States and Maryland Constitutions. The Circuit Court initially denied the Archdiocese's motion without prejudice and permitted limited discovery on the nature of the organist position to aid the Court in determining whether the "ministerial exception" would apply. App. 10a.

In discovery, Moersen admitted that his primary duty was to play the church organ at religious services. App. 11a. Moersen also admitted, in an affidavit, that he chose the music he would play during portions of those religious services. Court of Appeals Joint Record Extract ("R.") E49.

Moersen's written contract specified his responsibilities as the organist as follows:

> a. To build and sustain congregational song at all liturgies.
>
> b. To assist in selecting music associated with the worship at all liturgies in which he/she participates.
>
> c. To assist in planning the music associated with the above mentioned liturgies.
>
> d. To participate in special liturgical celebrations when requested, especially Christmas, Lenten and Easter litur-

gies, Confirmation, First Communion, and Reconciliation liturgies.

e. To work under the very general supervision of the choir directors of the Liturgical Choir and the Hispanic Choir.

f. To attend parish staff meetings when appropriate.

App. 8a–9a. The contract also specified that the organist reports to the director of the choir and is ultimately answerable to the pastor, and that he is an *ex officio* member of all committees concerning the liturgy. App. 9a. The contract explicitly placed the organist's duties in their religious context, stating that the objective of his position was "[t]o support the Gospel message through the music ministry of Saint Catherine Labouré Church and to encourage the congregation to assume an active part in their musical participation at all liturgical parish functions." App. 8a.

In his affidavit, Moersen made clear that he saw his duties more narrowly. As far as he was concerned, his sole duties were to play the organ (or piano or keyboard), to "select[ ] whatever organ music that I performed," and to suggest music for weddings and funerals. R. E49. Notwithstanding the explicit provisions of his contract, Moersen made clear that he did not see his function as supportive of any spiritual mission. He refused to acknowledge any obligation or effort on his part "to support the Gospel through the music ministry," "to encourage the congregation to participate," or to "support the spiritual or pastoral mission" of the church. R. E48–59. Indeed, he conceded that at times he was "openly critical of the Catholic faith." R. E50.

On May 3, 2004, the Archdiocese moved for summary judgment, on the ground that the First Amendment and the Maryland Constitution foreclosed all of Moersen's claims. The Archdiocese argued that its employment decisions regarding Moersen were protected by the ministerial exception.

because he performed an important liturgical function. Citing the prevailing standard for determining whether a position is "ministerial," the Archdiocese argued that Moersen's "primary duties" involved "participation in religious ritual and worship." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985) (quotations omitted), *cert. denied*, 478 U.S. 1020 (1986). The Circuit Court granted the Archdiocese's motion, stating that the outcome was controlled by the Maryland Court of Appeals decision in *Montrose Christian School Corp. v. Walsh*, 770 A.2d 111, 126 (Md. 2001). App. 57a, 59a. In particular, the court stated that *Montrose* contained a "broad holding": that "'if the employee's primary duties consist of . . . participation in a religious ritual,' which it undoubtedly and without dispute does [in this case]," then "the argument is not whether he participates, but what is the nature of his participation, how meaningful it is." App. 58a–59a. The court determined that Moersen's participation was sufficiently meaningful to render his position ministerial. App. 57a–60a.

Moersen appealed, and on June 13, 2005, the Court of Special Appeals reversed the judgment of the Circuit Court. App. 55a. In its opinion, the Court of Special Appeals explicitly noted the importance of music—particularly organ music—to the religious rituals of the Catholic Church. Specifically, the Court affirmed several undisputed factual propositions drawn from the Circuit Court record:

- "[T]he Catholic Church has . . . recognized the importance of music in its celebrations." App. 52a.
- "[T]he pipe organ is to be held in high esteem, for it is the traditional musical instrument that adds a wonderful splendor to the Church's ceremonies and powerfully lifts up the spirit to God and to higher things." *Id.*
- "[M]usical instruments as the accompaniment for singing have the power to support the voice, to

facilitate participation, and to intensify the unity of the worshipping assembly." *Id.*

- "Music is of great importance in the celebration of faith as it is intended to enhance the devotion of its listeners." App. 52a–53a.
- "[T]he organ is 'integral to the spiritual and pastoral mission not only of the local parish, but the universal Roman Catholic Church.'" App. 53a.

The Court of Special Appeals also noted that Moersen's contractual "duties were to 'support the Gospel message' through music and to 'encourage the congregation to assume an active part in their musical participation' at mass and other religious functions." App. 55a.

Acknowledging the "broad language of the contract," the Court of Special Appeals stated that it found no "*additional* evidence that [Moersen] did anything more than play the organ and occasionally sing during services." *Id.* (emphasis added). And acknowledging the importance of music to the church's liturgy, the Court nevertheless held that Moersen did not "play an integral or important role in religious ritual or worship" and was therefore not covered by the ministerial exception. *Id.*[1]

The Archdiocese petitioned the Court of Appeals for certiorari, which the Court granted on October 3, 2005. The Court of Appeals, however, ultimately affirmed the Court of Special Appeals' judgment in a divided, 4-3 decision. It

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[1] Both the Court of Special Appeals and the Court of Appeals incorrectly stated that the Moersen brought Title VII discrimination claims. App. 2a, 55a. The claims at issue were not for unlawful discrimination, but for wrongful discharge, breach of contract, and intentional infliction of emotional distress. The mischaracterization of the claims, however, does not affect the issue presented in this petition. As explained below, at pages 11–12, the ministerial exception is equally applicable to statutory claims of discrimination and common law tort and contract claims.

agreed with the Court of Special Appeals that "[a]lthough music is generally an important part of the Catholic faith, here, [Moersen's] position fell outside the ambit of the ministerial exception." App 13a. The Court explained:

> It is not enough to say that Moersen's music is central to the church's method of worship; it would be just as easy to say that the manufacturer of the organ contributes to the church's worship, or that the people involved in the upkeep of the organ and worship place contribute to the church's ability to maximize the participation in religious ritual.

App. 18a. The Court of Appeals noted that Moersen "was not required to have any specialized knowledge of the Catholic faith," App. 28a, and that he did not "lead any choirs, teach any hymns, or control any part of the church services in which he participated." App. 19a.

In a passage that summarized its view of the law and the facts, the Court explained: "*we simply are not convinced that [Moersen's] role was supervisory in any respect*, involved any form of church governance, or directly required the teaching or the spreading of the religious faith." App. 17a (emphasis added).

In concluding that a "supervisory" role in worship was required, however, the Court of Appeals relied on a misquotation of the decision of the United States Court of Appeals for the Fourth Circuit in *Rayburn*. The Maryland Court of Appeals noted that "[u]nder the 'primary duties' test, *see Rayburn*, 772 F.2d at 1169, to be deemed 'non-secular,' the [individual's] role must 'consist of teaching, spreading the faith, church governance, supervision of a religious order, *or supervision in religious ritual and worship*.'" App. 16a–17a (emphasis added). The actual wording of *Rayburn* is materially broader: it refers to "supervision *or participation* in religious ritual and worship." 772 F.2d at 1169 (emphasis added, quotations omitted). Notably, the Maryland Court of

Appeals did not omit the words "or participation" in an earlier quotation from *Rayburn*. *See* App. 6a. But at the critical part of its opinion, it eliminated "participation in" religious ritual and worship as a mark of a ministerial function.

Thus, to the Court of Appeals majority, it was insufficient that Moersen's primary duty was to "participate" in the liturgy—indeed, to play a highly visible role in the liturgy and to "encourage . . . musical participation" by the congregation. App. 8a. Insofar as his participation in religious services was concerned, the majority thought it dispositive that Moersen "was not in absolute control of the music played"—he only selected the organ music, not the hymns, App. 19a—and that he did not "lead any choirs, teach any hymns, or control any part of the church services in which he participated." *Id.* Under those circumstances, the Court determined that the duties Moersen performed "were not 'ministerial' in any sense." App. 20a.

In a dissenting opinion joined by Judges Raker and Cathell, Judge Harrell noted that "[t]here was no genuine dispute between the parties as to Moersen's contractual duties," which, he observed, included not only playing the organ, but also supporting the Gospel message through the music ministry, encouraging participation by the congregation, and assisting in the selection and planning of the music. App. 37a–38a. "A position entailing the performance of religious music, for a church during its religious services, to a religious end cannot possibly be perceived as anything but religious," the dissenters noted. App. 39a. In their view, "[t]he Majority opinion . . . ignored the overtly religious duties assigned to Moersen and instead accepted Moersen's characterization of his role at the Parish." App. 40a. Responding to the majority's comparisons, the dissenters noted that "Moersen, as the organist, was an active participant in liturgies in a way that an organ manufacturer or a person who merely tunes the organ is not." App. 41a. For that reason, the dissenters con-

cluded, "it is clear . . . that Moersen's position was ministerial in nature." App. 39a.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition to clarify the scope of the "ministerial exception"—a widely recognized principle, based on the Free Exercise Clause, that forecloses the application of state and federal employment laws to the hiring and firing of church ministers. This Court has never addressed the scope—or existence—of the ministerial exception. As explained below, however, the doctrine is based squarely on this Court's precedents, and it has been applied by numerous federal and state courts in a variety of settings. In the absence of a definitive application of the exception by this Court, however, there exists uncertainty over its scope.

This case illustrates the uncertainty that attends the doctrine. The decision of the Maryland Court of Appeals that a church organist is not covered by the exception stands in contrast to the decisions of federal courts in five circuits and state courts in at least two states. And the reasons that the Court of Appeals offered for its decision contribute to the uncertainty in this area.

The "ministerial exception" is premised upon the doctrine, explicitly endorsed by this Court, that the First Amendment protects the right of a church to conduct its internal affairs without government intervention. This doctrine, first articulated in *Watson v. Jones*, 80 U.S. 679, 733–34 (1871), protects the "power [of churches] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). When the subject matter of a dispute concerns "ecclesiastical government," "the civil courts exercise no jurisdiction." *Watson*, 80 U.S. at 733.

Nowhere does this principle of non-intervention apply more firmly than when the dispute involves the selection or retention of a church's ministers. As the Court held in *Kedroff*, "[f]reedom to select the clergy . . . [has] federal constitutional protection as a part of the free exercise of religion against state interference." 344 U.S. at 116 (footnote omitted).

There is, accordingly, near universal agreement among the federal and state courts that employment discrimination laws cannot be invoked to challenge a church's selection of its ministers. This "ministerial exception" to employment discrimination laws was first recognized in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972), a case in which the Court of Appeals for the Fifth Circuit held that an ordained minister of the Salvation Army could not maintain a Title VII claim for salary discrimination and retaliatory discharge. "The relationship between an organized church and its ministers," the court explained, "is its lifeblood." *Id.* at 558. Applying Title VII to that relationship, the court held, "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *Id.* at 560. The ministerial exception has since been widely recognized by the federal and state courts throughout the nation.[2]

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[2] *See Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007); *Young v. N. Ill. Conf. of United Methodist Church, Inc.*, 21 F.3d 184, 187–88 (7th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299,

Although developed in the context of employment discrimination statutes, the ministerial exception has also been applied to bar common law claims challenging decisions about the hiring and retention of those who serve in a ministerial capacity. As the Court of Appeals for the First Circuit has explained, "[h]owsoever a suit may be labelled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (holding the ministerial exception barred a variety of claims stemming from wrongful discharge); *see also Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986) (applying the ministerial exception to fraud, defamation, intentional infliction of emotional distress, and breach of contract claims); *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So.2d 640, 642–43 (Fla. Dist. Ct. App. 2007) (applying ministerial exception to claims brought under

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1303 (11th Cir. 2000); *Minker v. Balt. Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990); *Powell v. Stafford*, 859 F. Supp. 1343, 1347–48 (D. Colo. 1994); *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640, 642 (Fla. Dist. Ct. App. 2007); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 237 (Mich. Ct. App. 1988); *Celnik v. Congregation B'nai Israel*, 2006-NMCA-039, ¶¶15–21, 131 P.3d 102, 107–08 (N.M. Ct. App. 2006); *C.L. Westbrook, Jr. v. Penley*, --- S.W.3d ---, 2007 WL 1861168, at *9–*10 (Tex. June 29, 2007); *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 356 (Minn. Ct. App. 2004); *Fontana v. Diocese of Yakima*, 157 P.3d 443, 446 (Wash. Ct. App. 2007); *Hope Int'l Univ. v. Super. Ct.*, 14 Cal. Rptr. 3d 643, 653 (Cal. Ct. App. 2004); *Horine v. Vineyard Cmty. Church*, No. C–060097, ¶¶8–10, 2006 WL 3690309, at *2 (Ohio Ct. App. Dec. 15, 2006); *Jae-Woo Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 514 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002); *McKelvey v. Pierce*, 800 A.2d 840, 850–51 (N.J. 2002); *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 126 (Md. 2001); *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc.*, 875 A.2d 669, 671–73 (D.C. 2005); *Rweyemamu v. Comm'n on Human Rights & Opportunities*, 911 A.2d 319, 324–25 (Conn. App. Ct. 2006); *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820, 824 (Mass. 2002).

Florida "whistleblower" statute); *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681 (Ill. App. Ct. 1994) (breach of contract claim). In short, whatever the theory of liability, it cannot be invoked to defeat the right of a church to decide for itself who may serve in a ministerial capacity, without violating the First Amendment.[3]

The issue that has been the source of confusion in the courts is not whether the ministerial exception exists,[4] but

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[3] Some courts have held that the court lacks jurisdiction to entertain claims challenging ministerial employment decisions. *See, e.g., Hollins*, 474 F.3d at 225; *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006). Other courts have held that such a complaint fails to state a claim upon which relief can be granted. *See, e.g., Petruska*, 462 F.3d at 302–03; *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002).

[4] In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does not require individual exemptions from "valid and neutral law[s] of general applicability." *Id.* at 879 (quotation marks omitted). But *Smith* did not involve a *church's* institutional rights. Indeed, *Smith* explicitly reaffirmed the church autonomy decisions upon which the ministerial exception is based, *id.* at 877, and the courts have not construed *Smith* to affect its continuing vitality. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) ("[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs."); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 n.* (4th Cir. 2000) ("All circuits to have addressed the question have recognized the continuing vitality of the exception after . . . *Smith*. . . . We agree with this view.") (citations and quotation marks omitted); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) ("*Smith*'s language is clearly directed at the first strand of free exercise law, where an individual contends that, because of his religious beliefs, he should not be required to conform with generally applicable laws. The concerns raised in *Smith* are quite different from the concerns raised by Reverend Combs's case, which pertains to interference in internal church government."); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203

rather to whom it applies. This case exemplifies and compounds the confusion. In holding that a church organist did not fall within the ministerial exception, the Maryland Court of Appeals reached a decision at odds with the decisions of federal courts in five circuits and the decisions of state courts in at least two states. That disagreement, in turn, reveals a broader division on the standards and criteria that are to be used in identifying who performs a ministerial function. This case, therefore, provides the Court with an opportunity to resolve a specific conflict and to offer guidance on how the determination of ministerial status should be made.

I. THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEAL AND ILLUSTRATES THE CONFUSION THAT EXISTS OVER THE SCOPE OF THE MINISTERIAL EXCEPTION.

This case illustrates the uncertainty that exists over the scope of the ministerial exception—that is, over which kinds of employees fall within its coverage. The courts in general agree that the exception includes ordained ministers. But there is confusion over what other religious employees fall within the exception. The decision of the Maryland Court of Appeals compounds the confusion by holding—in contrast to the decisions of federal courts in five circuits and state courts in at least two states—that a church organist does not perform a ministerial role.

F.3d 1299, 1303–04 (11th Cir. 2000) ("[T]he ministerial exception created in *McClure* has not been overruled by . . . *Smith* . . . . [T]he exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration." (citations and quotation marks omitted)). *But see Hankins v. Lyght*, 441 F.3d 96, 102–04 (2d Cir. 2006) (holding that the Religious Freedom and Restoration Act displaced the ministerial exception).

Ever since the Fifth Circuit recognized an exception to laws governing employment decisions for "the employment relationship . . . between . . . a church and its minister," *McClure*, 460 F.2d at 560, courts have struggled to determine who is included in the definition of "minister." Most courts have followed the lead of the Fourth Circuit, which has clearly stated that the exception includes not only ordained ministers, but also a broad range of other church employees. *Rayburn*, 772 F.2d at 1168. The *Rayburn* court suggested that an employee "should be considered 'clergy'" if his or her "'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or *participation in religious ritual and worship*.'" *Id.* at 1169 (emphasis added) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1545 (1979)). Courts using this "primary duties" test have included a variety of religious employees within the ministerial exception—including a kosher supervisor at a Jewish nursing home,[5] an executive director of a multi-faith outreach program,[6] a pastoral resident at a religiously-affiliated hospital,[7] a Hispanic Communications Manager for an archdiocese,[8] and a chaplain at a religiously-affiliated hospital[9] and college.[10]

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[5] *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309 (4th Cir. 2004).

[6] *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332-33 (4th Cir. 1997).

[7] *Hollins*, 474 F.3d at 226.

[8] *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703-04 (7th Cir. 2003).

[9] *Scharon*, 929 F.2d at 362-63.

[10] *Petruska*, 462 F.3d at 304 n.6, 307, 312.

In other circumstances, however, the courts have reached divergent results. For example, teachers at church-related schools have been included within the ministerial exception by some courts and excluded by others.[11] And now, church organists have received inconsistent treatment.

The Maryland Court of Appeals declined to apply the ministerial exception to an employee who is responsible for playing the organ and selecting at least a portion of the music at liturgical services. Although the organist's contract explicitly provided that his function was "to support the Gospel message through the music ministry . . . and to encourage the congregation to assume . . . musical participation at all liturgical parish functions," App. 8a, the Court of Appeals held that his duties "were not 'ministerial' in any sense," App. 20a.

The Court of Appeals' decision is at odds with the otherwise unanimous view of the federal and state courts in similar cases.

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[11] *Compare Catholic Univ. of Am.*, 83 F.3d at 465 (holding a professor in a department of canon law covered by the ministerial exception); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283–84 (5th Cir. 1981) (holding the faculty at a seminary covered by the exception), *cert. denied*, 456 U.S. 905 (1982); *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681, 684 (Ill. App. Ct. 1994) (affirming dismissal of a complaint by a parochial school kindergarten teacher, because the process through which she was employed was an "ecclesiastical issue into which a civil court may not inquire") *with Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396–97 (4th Cir. 1990) (holding teachers at pervasively religious school not covered by the ministerial exception), *cert. denied*, 498 U.S. 846 (1990); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171–72 (2d Cir. 1993) (holding math teacher with duties of leading students in prayer and taking them to Mass not covered by the exception); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding the faculty and staff at a religious college not covered by the exception), *cert. denied*, 453 U.S. 912 (1981).

- In *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000), the United States Court of Appeals for the Fifth Circuit held that a choir director could not maintain a claim under the Americans with Disabilities Act, because her "position as choir director required her to perform ministerial functions." 198 F.3d at 175. The court based this conclusion on three factors: (1) that employment decisions concerning the choir director were made "largely on religious criteria"; (2) that the choir director was "qualified and authorized to perform the ceremonies of the Church"; and (3) "probably most important," that the choir director "engaged in activities traditionally considered ecclesiastical or religious." *Id.* at 176–77 (internal quotations and citations deleted). The court explained that "religious music plays a highly important role in the spiritual mission of the church"—indeed, that "music constitutes a form of prayer that is an integral part of worship services." *Id.* "Because the evidence shows that [the choir director] participated in religious rituals and had numerous religious duties"—including planning music for liturgies, rehearsing and conducting the choir, hiring musicians and writing articles about the church's music ministry for the weekly bulletin—the court concluded that "she qualifies as a 'minister'" for purposes of the ministerial exception. *Id.* at 177.

- In *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir. 2000), the Court of Appeals for the Fourth Circuit held that a Director of Music Ministry and Organist fell within the ministerial exception. As in this case, the formal job description noted two "plainly spiritual objectives" of the position: (1) "[t]o assist in developing a prayerful, singing assembly . . . ," and (2) to "support the Gospel message through song and challenge the assembly to live it more fully." *Id.* at 799. To those ends, the plaintiff directed the choirs, trained the cantors, helped to lead the congregation in song, and planned the music subject to the

oversight of the pastor, who had the final authority over musical selections. *Id.* at 799, 803.

"At the heart of this case," Judge Wilkinson explained for the court, "is the undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred." *Id.* at 802. "It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty." *Id.* In short, the court concluded, the performance of music is "'important to the spiritual and pastoral mission' of the church," *id.* at 802 (quoting *Rayburn*, 772 F.2d at 1169), and the organist "played a prominent role in worship services," *id.* at 803. "Even where [she] did not select the music herself," the court explained, "the subtle judgments that accompany the presentation and interpretation of sacred music contribute to its spiritual effect." *Id.*

- In *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006), the Seventh Circuit Court of Appeals held that the ministerial exception applied to a church music director and organist whose duties included playing the organ, preparing music in consultation with the pastor, and directing the chorus. Tomic made essentially the same argument that Moersen makes in this case – that "all [he] did was play music." *Id.* at 1040. Writing for the court, Judge Posner rejected that argument, noting that "there is no one way to play music." *Id.* "If Tomic played the organ with a rock and roll beat," the court elaborated, "he would be altering the religious experience of the parishioners." *Id.* Whereas the Maryland Court of Appeals in this case found it difficult to distinguish between the role of an organist and the role of those responsible for the organ's upkeep, App. 18a, the *Tomic* court saw a plain distinction: "Tomic's duties, unlike those . . . of the person who tunes the organ . . . , had a significant religious dimen-

sion." *Id.* at 1041. Quoting the *Starkman* and *Diocese of Raleigh* cases, the court concluded that the organist and music director "performed tasks that were traditionally ecclesiastical or religious," *id.* at 1041 (internal quotation marks omitted), and was therefore covered by the ministerial exception.[12]

- In *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. Civ. A. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005), a district court held that a Director of Music "falls squarely within the . . . 'ministerial exception,'" because her duties "were significant to the spiritual and pastoral mission of [the] Church." *Id.* at *6.

- In *Ross v. Metropolitan Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007), the district court held that a church's director of worship arts (a position that included performing music in church) fell within the ministerial exception. The court adopted the reasoning of the Fourth, Fifth, and Seventh Circuits—stating that because the employee's position was "important to the spiritual and pastoral mission of the church" and included "supervision or participation in religious ritual and worship," it was ministerial in nature. *Id.* (quotation marks omitted).

- In addition to these federal courts, two state courts have held that state discrimination laws cannot be applied to church musicians. *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 354-56 (Minn. Ct. App. 2004) (holding that a music director's position was ministerial); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (holding that the ministerial exception applied to a church organist).

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[12] *See also Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1183 (E.D. Wis. 2001) (holding that a church music director fell within the ministerial exception because she "engaged in traditionally ecclesiastical or religious activities").

The decision of the Maryland Court of Appeals in this case stands in contrast to all of these decisions. The Court held that the church does not have the unqualified First Amendment right to select an organist who plays a prominent role in its liturgy. In reaching this conclusion, the Court of Appeals purported to distinguish the numerous decisions holding organists and music directors to be ministerial in nature. And to be sure, in some of those cases the plaintiff had duties beyond those that Moersen acknowledged in this case. But the central element in those cases—that the plaintiff's performance of music during liturgical services was itself "important to the spiritual and pastoral mission of the church," *Diocese of Raleigh*, 213 F.3d at 802—is equally present in this case. The distinctions that were drawn by the Court of Appeals have little to do with whether a Church ought to have the right to decide who may play such a prominent role in its liturgies.

1. The Court of Appeals reasoned in part that the organist in this case "was neither required to have specialized knowledge of the Catholic faith, nor expected to have any particular religious training." App. 19a. To be sure, courts have cited ordination or a requirement of formal religious training *in support* of a finding that a person performs a ministerial role. *See, e.g.*, *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991) (considering appellant's ordination in determining her position was ministerial); *Starkman*, 198 F.3d at 176 (noting requirement of religious course work). Other courts, however, have not found the *lack* of religious training dispositive. What has been determinative in these cases is "the function of the position," not any requirement of formal religious training. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306, 309 (4th Cir. 2004) (quotations omitted) (weighing the importance of appellant's position, rather than any specialized training, which he claimed was not required for the position, and holding the ministerial

exception applicable); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (holding that appellant's role as the Hispanic Communications Manager of the Archdiocese of Chicago was ministerial because she was the "liaison between the Church and the community to whom it directed its message," and not because of any particular religious training); *see also Gabriel v. Immanuel Evangelical Lutheran Church*, 640 N.E. 681 (Ill. App. 1994) (barring claim of prospective parochial-school kindergarten teacher because of the process of selection, not any requirement of specialized knowledge or training).

The Court of Appeals' emphasis on the plaintiff's lack of "religious training" or "specialized knowledge of the Catholic faith" is seemingly at odds with the reasoning that prevails in these cases. And if musical performance itself "serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty," *Diocese of Raleigh*, 213 F.3d at 802, then the Church must have the right to decide who may perform that function regardless of whether formal religious training or specialized knowledge of the faith is a requirement of the position.

2. More fundamentally, the Court of Appeals thought it dispositive that Moersen did not have leadership or supervisory responsibilities. In that respect, its reasoning stands in sharp contrast to the widely quoted standard articulated by the Court of Appeals for the Fourth Circuit in *Rayburn*—that an employee's function is ministerial if his primary duties involve "supervision *or participation* in religious ritual and worship." 772 F.2d at 1169 (emphasis added). Given that "supervision *or* participation" has been thought to suffice, it is understandable that courts have emphasized an employee's

supervision or leadership when it is present.[13] But no court previously has identified supervisory responsibilities as a requirement. In *Starkman*, the court of appeals identified the ultimate question as whether the individual was a "spiritual leader," but then defined that term to include "all employees . . . whose primary functions serve [the church's] spiritual and pastoral mission." 198 F.3d at 175–76 (quotations and citation deleted). In this case, the Maryland Court of Appeals treated supervision or leadership as an independent requirement, in addition to that of serving the church's liturgical mission.

It was not enough in the Court of Appeals' view that Moersen's primary duty was to "participate" in the liturgy—indeed, to play a prominent role in the liturgy. "It [was] not enough to say that Moersen's music is central to the church's method of worship." App. 18a. The Court of Appeals thought Moersen's liturgical function insufficient to render his position ministerial, because it was "simply . . . not convinced that [his] role was supervisory in any respect." App. 17a. It explained that he was not required, as was the choir director in *Starkman*, "to plan worship liturgy," "coordinate church and worship activities relating to the church's Music Ministry," "conduct . . . choirs, [or] hire musicians and lower level music ministry directors." App. 33a.

As the three dissenting judges in the Court of Appeals noted, "the Majority opinion makes too much of the leadership and more extensive responsibilities" of the music directors and organists in some of the other decided cases. App. 43a.[14] Indeed, the majority's limitation of ministerial

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[13] *See, e.g., Ross v. Metro. Church of God*, 471 F .Supp. 2d 1306, 1311 (N.D. Ga. 2007) (giving weight to supervision and direction of church affairs); *Assemany*, 434 N.W.2d at 238 (noting that the employee had a "leadership role" in the parish).

[14] The dissenters also noted, with justification, that the majority had "ignored the overtly religious duties assigned to Moersen and instead

positions to those that are supervisory cuts against the prevailing view, as stated by the Court of Appeals for the Fourth Circuit:

> [T]here is no requirement that an individual have the "final say" on spiritual matters before the ministerial exception can be applied. While the exercise of "religious discretion" of this variety may be considered in determining whether a position is ministerial, it is not talismanic. Rather, it is enough that [the employee's] "primary duties consist of teaching, spreading the faith, . . . or supervision or *participation* in religious ritual and worship.

Diocese of Raleigh, 213 F.3d at 803 (quoting *Rayburn*, 772 F.2d at 1169) (emphasis added).

Thus, for example, in *Petruska*—where the court held that a former chaplain's Title VII claims were barred by the ministerial exception—the court did not focus on any supervisory role she performed, but rather on indicia that her "primary duties *involved* ministerial functions." 462 F.3d at 307 n.10 (emphasis added). And in *Shaliehsabou*, the court held that the mashgiach (a kosher food inspector) was a "minister" for purposes of the exception, even though he "lacked independent authority to make some decisions" and would have to "consult with the Vaad [the Rabbinical Council] for proper resolution of any concerns." 363 F.3d at 309–10; *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d at 463–64 (D.C. Cir. 1996) (holding a canon law professor was a

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accepted Moersen's characterization of his role." App. 40a. That an organist "denie[s] . . . discharging" certain of the religious duties assigned to the position, App. 11a, and denies more broadly the explicitly religious objectives of the position, *see* page 4, *supra*, ought to underscore, not diminish, the importance of respecting the church's right to make a change. As the dissenters observed, however, Moersen's role should be regarded as ministerial even accepting his averment that he only played the organ. App. 40a.

"minister" without regard to whether she had supervisory functions); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991) (holding Chaplain at a church-affiliated hospital, who was subject to supervision, to be ministerial).

By limiting the ministerial exception to those who play a leadership role in the liturgy—and then excluding the organist from that category—the Court of Appeals has effectively limited the church's right to control the conduct of its liturgy. As several courts have recognized, the organist plays a role of prominence in the liturgy. At times, his is the only voice to be heard by the congregation: at those times, he alone sets the mood and tone of the service. At other times, the organist accompanies the congregation in song: at those times, he can move and inspire the people to elevate their participation and deepen their spiritual experience.

Other courts have had no difficulty recognizing the important contribution of the organist to religious worship—and the importance of allowing the church to determine who serves in that capacity. As Judge Posner explained in *Tomic*, a case that the Maryland Court of Appeals majority did not cite,

> there is no one way to play music. If [the organist] played the organ with a rock and roll beat, or played excerpts from *Jesus Christ Superstar*, at an Easter Mass he would be altering the religious experience of the parishioners.

442 F.3d at 1040.

The Court of Appeals thought it significant that Moersen did not select all of the music that he performs: as he stated in his affidavit, he "selected whatever organ music he performed," but others selected the music that was sung and he only "suggested" music for funerals and weddings. R. E49. Other courts have not thought such distinctions significant. As Judge Wilkinson explained in the *Diocese of*

Raleigh case: "even where [the organist does] not select the music herself, the subtle judgments that accompany the presentation and interpretation of sacred music contribute to its spiritual effect." *Diocese of Raleigh*, 213 F.3d at 803.

The Court of Appeals appeared to view the organist as a mere technician. But again, Judge Wilkinson fairly rebutted that proposition:

> Indeed, it is not easy to divorce even the more technical aspects of music from its significance in religious worship. Whether a selection is played *adagio* or *andante* can have a profound effect on the religious worship and vocal participation of the congregation. And different performances of the same musical piece can evoke different responses.

Id. at 804. The organist, in short, is a "primary human vessel through whom the church [chooses] to spread its message in song." *Id.*

That the organist does not supervise anyone else does not detract at all from the important role he plays in the liturgy. Lay communion ministers at Mass do not supervise or lead anyone, yet there is no doubt that their function is ministerial.

Contrary to the Court of Appeals' conclusion, "[i]t *is* . . . enough"—or *should* be enough—"to say that [the organist's] music is central to the church's method of worship," App. 18a (emphasis added), and that the organist's role in the liturgy is one that can materially affect the quality of the religious experience for all. As the dissenters noted: "A position entailing the performance of religious music, for a church during its religious services, to a religious end cannot possibly be perceived as anything but religious." App. 39a. The church has an interest in determining who may assume such a prominent role in the liturgy, and that is precisely the interest that is protected by the ministerial exception.

In sum, this case presents an opportunity to resolve a disagreement among the courts on how to treat those engaged in music ministry and, at the same time, to offer guidance on the standards and criteria that determine an employee's ministerial status.

II. THE SCOPE OF THE MINISTERIAL EXCEPTION IS AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Since the time when it was first recognized thirty-five years ago, the ministerial exception has protected the freedom of churches to determine for themselves who will function in a ministerial capacity, without fear of liability or the prospect of intrusive and expensive litigation. Churches have a vital interest in knowing that this protection extends to all who play roles of prominence in their liturgies.

This Court has never had occasion to address the ministerial exception, and it now has an opportunity to provide much-needed guidance. As long as the doctrine remains one that is confined to the lower courts, its very foundation is less secure than it should be. And as long as its contours are defined solely by lower court opinions, its scope will remain less clear than it should be.

One relatively recent case underscores the overall need for guidance. In *Hankins v. Lyght*, 441 F.3d 96, 102 (2d Cir. 2006), the United States Court of Appeals for the Second Circuit described the ministerial exception as a "judge-made doctrine[]" that has been "displace[d]" by the Religious Freedom Restoration Act – in other words, as a doctrine that is not constitutionally mandated. That decision is an aberration: to our knowledge, every other case to consider the question has regarded the exception as either constitutionally

mandated[15] or, at the very least, required to avoid potential constitutional questions.[16] But the *Hankins* decision nevertheless reflects the uncertainties that will persist until this Court issues a definitive ruling on the ministerial exception.

The Maryland Court of Appeals decision, like *Hankins v. Lyght*, might be dismissed as an outlier, because every other case involving a church musician has been decided the other way. But the decision and its reasoning cast substantial doubt on the scope of the ministerial exception—doubt that will continue to persist until this Court speaks definitively on the subject.

Uncertainty as to the scope of the ministerial exception inevitably dampens "the spirit of freedom for religious organizations" that it is intended to protect. *Kedroff*, 344 U.S. at 116. As this Court noted in an analogous context in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987):

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

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[15] *Natal*, 878 F.2d at 1576–77; *Petruska*, 462 F.3d at 306; *Diocese of Raleigh*, 213 F.3d at 800; *Hollins*, 474 F.3d at 225; *Tomic*, 442 F.3d at 1037–40; *Scharon*, 929 F.2d at 363; *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d at 940, 944 (9th Cir. 1999); *Gellington*, 203 F.3d at 1303–05 (11th Cir. 2000); *Catholic Univ. of Am.*, 83 F.3d at 461; *Montrose*, 770 A.2d at 126.

[16] *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972).

In this area in particular, "[t]here is the danger that churches, wary of . . . judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." *Rayburn*, 772 F.2d at 1171. Needless to say, the greater the level of uncertainty over the scope of the ministerial exception, the greater is that danger.

The time is ripe, and the opportunity is presented, for this Court to address the ministerial exception—to solidify its constitutional foundation, to confirm its importance, and to clarify its scope. Church organizations throughout the country, as well as those who work in their service, have an interest in this Court's granting the petition and resolving the question that it presents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF MARYLAND

No. 69
Sept. Term, 2005

ARCHDIOCESE OF WASHINGTON, *et al.*

v.

WILLIAM T. MOERSEN

June 14, 2007

Emmet T. Flood (Lisa M. Duggan and Jeb Boatman of Williams & Connolly, LLP, Washington, DC), on brief, for Petitioners.

L. Jaenette Rice (Walsh, Becker, Spears & Moody, Bowie, MD), on brief, for Respondent.

Argued before BELL, C.J., RAKER, WILNER,* CATHELL, HARRELL, BATTAGLIA and GREENE, JJ.

BELL, *Chief Judge.*

The central issue in this case involves whether an organist for a Catholic church falls within the Title VII "ministerial exception," a legal exception carved out in deference to the Free Exercise Clause of the First Amendment that precludes government interference, or judicial involvement, in the em-

* Wilner, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

ployment decisions of religious organizations. We shall hold that, under the facts of this case, an organist holding a position similar to that occupied by the respondent does not come within the ministerial exception. Thus, he may prosecute a Title VII claim.

A.

The First Amendment, as relevant, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., Am. I. These religious prohibitions are applied to the states through the Fourteenth Amendment. *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 876-77, 110 S.Ct. 1595, 1599, 108 L.Ed.2d 876, 884 (1990). *See also Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217-18 (1940); *Levitsky v. Levitsky*, 231 Md. 388, 396-97, 190 A.2d 621, 625 (1963); *Craig v. State*, 220 Md. 590, 599, 155 A.2d 684, 690 (1959). The free exercise clause prohibits government regulation of religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 219, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15, 27 (1972). Legitimate claims to free exercise, however, can be outweighed by government interests, albeit only those of the highest importance. *Yoder*, 406 U.S. at 214-15, 92 S.Ct. at 1532-33, 32 L.Ed.2d at 23-25.

The free exercise protection is also present in Article 36 of the Declaration of Rights of the Maryland Constitution. It provides, as relevant, that:

> ". . . all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or

> contribute, unless on contract, to maintain, any place of worship, or any ministry . . ."

The Free Exercise Clause, as embodied in the U.S. Constitution and Article 36 of the Maryland Declaration of Rights, does not provide "a constitutional right to ignore neutral laws of general applicability," even when such laws have, as an incidental effect, the burdening of a particular religious activity, however. *City of Boerne v. Flores*, 521 U.S. 507, 513, 117 S.Ct. 2157, 2161, 138 L.Ed.2d 624, 634 (1997). *See also Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472, 489 (1993); *Employment Div., Ore. Dept. of Human Res.*, 494 U.S. at 892, 110 S.Ct. at 1607, 108 L.Ed.2d at 894; *Levitsky*, 231 Md. at 396-397, 190 A.2d at 625; *Craig*, 220 Md. at 599, 155 A.2d at 689.

Under the Free Exercise Clause, strict scrutiny is used to evaluate whether laws target religious practices or impose burdens, motivated by religious belief, on conduct. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32, 113 S.Ct. at 2226, 124 L.Ed.2d at 489. Moreover, the Supreme Court has noted that:

> "[A] spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116, 73 S.Ct. 143, 154-155, 97 L.Ed. 120, 136-137 (1952).

The Supreme Court has made clear that the church can self-govern beyond the reach of judicial power. *See, e.g.,*

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 504, 99 S.Ct. 1313, 1320, 59 L.Ed.2d 533, 543 (1979) (holding that, because of a potential conflict with the First Amendment, the National Labor Relations Act did not apply to teachers in church-operated schools). Federal courts have reinforced that message. *See, e.g., Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) (holding that, in matters of church governance and administration, the government shall not interfere); *Bollard v. California Province of Society of Jesus*, 196 F.3d 940, 945 (9th Cir.1999) (holding that the "Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs"); *Combs v. Central Texas Annual Conference United Methodist Church*, 173 F.3d 343, 348 (5th Cir.1999) (noting that the Free Exercise Clause protects a church from government interference with church management); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 463 (D.C.Cir. 1996) (holding that the Free Exercise Clause "guarantees a church's freedom to decide how it will govern itself").

Employment decisions typically are governed by Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* (1964). That Title makes unlawful any employment practice that discriminates on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-1 (a) carves out a statutory exception, however. That exception is for:

> " . . . an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

(Emphasis added).

This "exception" for religious organizations also is embodied in 42 U.S.C. § 2000e-2 (e), which provides:

> "(2) *it shall not be an unlawful employment practice* for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or *by a particular religious corporation, association, or society*, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."

(Emphasis added).

The exception for religious organizations and their employment relationships with persons performing religious duties was considered by the Supreme Court in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336, 107 S.Ct. 2862, 2868, 97 L.Ed.2d 273, 283 (1987). Supporting the exception, it explained:

> "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."

See also Gellington, 203 F.3d at 1303-1304 (holding that government interference with clergy employment matters violates the Free Exercise Clause); *Combs*, 173 F.3d at 350 (holding that the judiciary could not rule on an employment

decision concerning a minister without violating the Free Exercise Clause).

This Court, in addition to recognizing the Title VII exception insulating religious organizations from sanction for discrimination when making employment decisions, based on religious beliefs, even with respect to the protected classes of race, color, sex, and national origin, the other protected classes, has recognized that under Title VII, "the Free Exercise Clause of the First Amendment precludes the application of these Title VII provisions to employment decisions by religious organizations concerning ministers, teachers, and other employees whose duties are 'integral to the spiritual and pastoral mission' of the religious organization." *Montrose Christian School Corporation v. Walsh*, 363 Md. 565, 590, 770 A.2d 111, 126 (2001), *quoting E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 797 (4th Cir.2000). Other courts have done so as well. *See Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir.1991) (holding that a parochial school teacher could not, because of the exception, file a Title VII claim even though she was discharged because she remarried); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir.1991) (holding that, in a gender discrimination action, a chaplain at a church hospital could not file a Title VII claim). In other words, engrafting a ministerial exception onto the Title VII protected classes allows the church significant latitude in its employment decisions when the employee in question has duties that are integral to the religious mission.

The "ministerial exception to Title VII," as it is known, applies to any employee whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir.1985). *See also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.

1972) (a sex discrimination case, in which the Court found that the role of a Salvation Army officer fit within the scope of the "ministerial exception"). More specifically, *Rayburn*, 772 F.2d at 1168, established what has become known as the "primary duties" test. Pursuant to that test, the ministerial exception "does not depend upon ordination but upon the function of the position." 772 F.2d at 1168

This Court recognized this exception in *Montrose*. There, we interpreted a Montgomery County statute that provided, "it shall not be an unlawful employment practice * * * [f]or a religious corporation, association, or society to hire and employ employees of a particular religion," holding that it was not violative of the Free Exercise Clause of the First Amendment nor of Article 36 of the Maryland Declaration of Rights. 363 Md. at 584, 770 A.2d at 122.[1]

With this context in mind, we turn to the case at hand.

B.

The respondent, William Moersen ("Moersen"), was employed as an organist at St. Catherine Labouré Parish ("the Parish") from 1958 to 1976[2] and again from 1991 to 2002.

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[1] In *Montrose Christian School Corporation v. Walsh*, 363 Md. 565, 770 A.2d 111 (2001), a consolidated case, two school employees brought an employment discrimination action against a private religious school and its principal. The employees claimed they had been terminated for not being of the religion represented by the school.

The case turned on whether a local ordinance, § 27-19 of the Montgomery County Code, which prohibited employers from discriminating against employees on the basis of religious creed, but carved out an exception for those employees performing religious functions, violated Article 36 of the Maryland Declaration of Rights. This Court held that it did not. 363 Md. at 596, 770 A.2d at 129.

We are not, under the facts of the case *sub judice*, asked to resolve the merits of *Montrose*.

[2] Moersen originally began working at the Parish in 1958 as an organist, when he was eleven years old.

During these periods, he did not have a written employment contract. On July 11, 2001, Moersen and Robert G. Amey, the Pastor of the Parish, entered into an employment contract for Moersen's services as "Organist/Pianist/Keyboard Accompanist." Being for a term of two years, from July 1, 2001 until June 30, 2003, the contract provided, with respect to the respondent's responsibilities:

"*Job objectives:*

"To Support the Gospel message through the music ministry of Saint Catherine Laboure Church and to encourage the congregation to assume as active part in their musical participation at all liturgical parish functions.

"*Job description:*

"To provide Organ/Piano/Keyboard Music and/or musical accompaniment to both the congregation and the choirs of Saint Catherine Laboure Church at the 10:30 a.m., 12:00 noon and 1:15 p.m. Sunday services; to provide the same at the weekly Saturday 5:15 p.m. service; to provide same at special liturgical celebrations as listed below; to provide musical accompaniment for the congregation at the 7:00 p.m. Monday night weekly novena service.

"2. *Responsibilities of the organist:*

"a. To build and sustain congregational song at all liturgies.

"b. To assist in selecting music associated with the worship at all liturgies in which he/she participates.

"c. To assist in planning the music associated with the above mentioned liturgies.

"d. To participate in special liturgical celebrations when requested, especially Christmas, Lenten and

Easter liturgies, Confirmation, First Communion, and Reconciliation liturgies.

"e. To work under the very general supervision of the choir directors of the Liturgical Choir and the Hispanic Choir.

"f. To attend parish staff meetings when appropriate.

"3. *Related job requirements:*

"a. The organist reports to the director of the choir concerning music and also has, as needed, access to the pastor who is ultimately the person to whom the organist must answer to regarding job related issues.

"b. The organist shall be an ex officio member of all committees concerning liturgy.

"c. The organist will accept engagements to assist at weddings and funerals and when he is unable to accept such engagements he will recommend suitable substitutes if he is asked to do so. The fees for these services will be a matter between the organist and the party requesting his services.

"d. The organist will receive four (4) weeks of paid vacation each year."

For the performance of those duties, the respondent was to receive an annual salary of $26,500.00, in addition to other benefits, including hospitalization insurance. Also, "[b]y mutual agreement the parties to the contract may terminate the contract in writing with advance notice of 90 (ninety) calendar days."

In 2001, the respondent informed the pastor who was in charge of the Parish and employment decisions, that he had been sexually abused by a Parish choirmaster from 1958 to

1964.[3] Immediately after reporting the sexual abuse, the respondent alleged that his employment situation began to deteriorate, as the pastor began to find fault with the respondent's performance. Prior to 2001, the respondent's performance record had been exemplary; he had never received a negative performance evaluation or warning during the some twenty-nine (29) years of employment with the Parish.

In November 2001, Moersen was told that he should retire from his position with the Parish, and was offered up to $2,000.00 to seek psychiatric counseling. Thereafter, on February 17, 2002, the respondent's employment was terminated unilaterally and without advance notice, based on his "apparent inability to work cooperatively." The respondent brought an action alleging breach of contract, wrongful discharge, and intentional infliction of emotional distress against the Parish, its pastor, and the Archdiocese of Washington (collectively, "the petitioners,") in the Circuit Court for Prince George's County.

The Archdiocese moved to dismiss the respondent's complaint. It argued that the court lacked subject matter jurisdiction and, based on the religious guarantees of the U.S. and Maryland Constitutions, the complaint failed to state a claim. The Circuit Court denied the motion, so that the parties could engage in discovery, albeit limited, as to the nature of the organist position, a matter critical to determining whether the "ministerial exception" would apply.

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[3] These acts of sexual abuse, Moersen alleged, occurred at the Parish itself during church services, at church-sponsored functions, and at other locations. Beginning in 1958 and through 1964, he said that he communicated to at least four different priests that he was being abused. All of these priests praised him for his honesty and advised him to get himself out of the situation. The Parish, however, never took any action against the offender, he maintained.

In 2001, Moersen requested that the pastor relay his allegations of abuse to church superiors and the pastor assured the respondent that he would.

In answers to interrogatories and answers to requests for admissions, the respondent admitted that his contract enumerated several religious purposes. In those answers, he denied, however, discharging any of those duties and stated that he "did not encourage the congregation to assume an active part in their musical participation."

In moving for summary judgment, the Archdiocese argued that, under *Montrose*, the respondent's position was covered by the ministerial exception. It emphasized that the respondent's undisputed duty was to play music at religious services for the Catholic Church. The motion was granted, precipitating Moersen's appeal to the Court of Special Appeals.

In an unreported opinion, the Court of Special Appeals reversed the judgment of the Circuit Court. It held that the court erred in granting the petitioners' motion for summary judgment. We granted the petitioners' petition to this Court for a writ of certiorari. *Archdiocese v. Moersen*, 389 Md. 124, 883 A.2d 914 (2005).

C.

Central to determining whether the ministerial exception applies in the case *sub judice* is deciding what, in fact, Moersen's role was in the church, which, in turn, requires an assessment of his duties. Until 2001, the respondent worked without a written contract. Only in 2001 was the first written contract introduced into the employment relationship.

Although this contract enumerated, with some specificity, job objectives, the respondent maintains that he was not required to perform and had never been required to, and, in fact, did not, achieve or attempt to achieve all of them. As far as he was concerned, his only duties at the Parish were to provide at the 10:30 a.m., 12:00 noon, and 1:15 p.m. Sunday services instrumental music and/or musical accompaniment to both the congregation and the choirs of St. Catherine Laboure Church, to provide those services at the weekly Saturday 5:15

p.m. service, to provide musical accompaniment for the Tuesday and Friday evening weekly choir rehearsals, to provide musical accompaniment at special services, when requested, and to provide musical accompaniment for the congregation at the 7:00 p.m. Monday night weekly novena service. Moersen contends that he did not plan, nor select, the music associated with the worship at any of the liturgies. That was done by either the Music Director or choir directors. In essence, the respondent claims that he was merely an organ player.

The respondent further contends that he supervised no one, and, in fact, never performed any duties in a leadership, teaching or training capacity. Nor was he required to attend staff or committee meetings. Consistently, the respondent was not listed as a staff member on the church directory of St. Catherine Laboure. As was true with the other religious groups for whom he performed as an organist or pianist, including Jews, Moslem and Hindu, he was not required to profess, support or become a member of the Catholic faith.

The petitioners viewed, and continue to do so, Moersen's role quite differently. They stress that Moersen's contract placed on him the responsibility to "(1) build[ ] and sustain[ ] congregational song at all liturgies, (2) assist[ ] in selecting and planning the music associated with liturgical worship, and (3) participat[e] in special liturgical celebrations." In addition, the petitioners note that the contract placed the respondent's duties in a "larger religious perspective," "[t]o support the Gospel message through the music ministry of Saint Catherine Laboure Church and to encourage the congregation to assume an active part in their musical participation at all liturgical parish functions."

The Court of Special Appeals' approach to the dispute in this case was to look at similar cases involving employees of a church whose duties involved providing music for the services and church events. From that analysis, the intermedi-

ate appellate court held that "[a]lthough music is generally an important part of the Catholic faith, here, [Moersen's] position fell outside the ambit of the ministerial exception." We agree.

The Court of Special Appeals primarily relied on *Assemany v. Archdiocese of Detroit*, 173 Mich.App. 752, 434 N.W.2d 233 (1988), whose facts were compared to the facts in the case *sub judice*. In *Assemany*, the appellant, a white male organist, had graduated from a school operated by the church to train organists and worked for several Catholic parishes in the Detroit area. 434 N.W.2d at 234. He was offered a position as the musical director for the a parish in the Archdiocese, and was given an "oral assurance of lifetime employment as long as he did his job properly." *Id.* The applicable contract prescribed his responsibilities:

> "The music Director will be, in conjunction with the Parish Worship Committee, completely responsible for all liturgical music in the parish, and all music connected with paraliturgical services, such as bible vigils, vespers, penance services, etc."

434 N.W.2d at 234. In addition, it required the appellant to: "select, prepare, and teach suitable and appropriate music to the congregation, prepare music fitting to the theme of each Sunday and holy day liturgy, provide music for the daily masses, select music for and direct the parish choir, aid in the musical participation of Gesu students in their liturgies, assist with and participate in liturgies or musical events on a vicariate level and provide music for weddings and funerals [, and . . .] to be present fifteen minutes in advance of any liturgy or parish activity in which he was to participate."

434 N.W.2d at 234-35. The appellant subsequently[4] "assumed the duties of teaching the school children at [the

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[4] The appellant entered into a second three-year contract after the initial term expired, again being retained as the musical director.

parish] to participate in daily mass and conducting a children's choir . . . he handled all of the musical functions for the parish liturgies." 434 N.W.2d at 235.

Toward the end of the appellant's second term as music director, the parish received a new pastor, and the appellant's relationship with the church began to deteriorate. *Id.* The new management criticized the appellant's abilities and the choices he made as musical director. *Id.* Although the appellant was re-signed to a one-year contract, that contract detailed areas that "needed improvement," and required him to take music lessons to improve his ability and to develop a program to prepare the children to sing at the Saturday and Sunday services. *Id.* Before the expiration of the contract term, the appellant was informed by the pastor that "[the parish] needed a younger and black organist," and that his contract would not be renewed. *Id.* From the expiration of his contract term to his dismissal, approximately a year later, the appellant's job description was:

> "Plaintiff was given the new title of pastoral musician. The contract incorporated a job description for that position. Plaintiff was relieved of his responsibilities to teach music to children in the Gesu school and to direct the children's choir. He was in charge of the liturgical music of the parish and its performance. In addition, plaintiff was to develop a cantor program at Gesu in accordance with the guidelines of the archdiocesan program for cantors."

434 N.W.2d at 235-36.

The parish, meanwhile, hired a younger white man to teach the parish students, direct the children's choir, and play the music for daily mass. When this man resigned later, the appellant unsuccessfully sought to resume those responsibilities. The parish hired a young black man instead. 434 N.W.2d at 236.

The appellant filed a discrimination claim against the parish. The trial court, however, granted summary judgment to the parish on the ground that, as a "nonsecular (religious)" employee, *id.*, his claims were barred by the Free Exercise Clause of the First Amendment. 434 N.W.2d at 234. The Supreme Court of Michigan affirmed. *Id.* The court rejected the appellant's argument that his role was merely secular because, although he was engaged in a religious activity, he was not promoting the church's faith or doctrine. 434 N.W.2d at 238. It explained:

> "Plaintiff was required to have a working knowledge of the Catholic religion and liturgy. He was responsible for the selection and teaching of all liturgical music in the parish. His primary responsibility was to enable and encourage the Gesu choir and congregation to participate in the Catholic liturgy through song. Plaintiff assumed a pastoral-liturgical leadership role in the parish.
>
> "On the basis of the facts of this case, we conclude that, while employed at Gesu, plaintiff was more than just an organist. He was the head of the musical branch of the Catholic liturgy there. Plaintiff was intimately involved in the propagation of Catholic doctrine and the observance and conduct of Catholic liturgy by the Gesu congregation. On the basis of 'the function of his position,' plaintiff was, thus, 'clergy' . . . His Title VII discrimination claim is therefore barred by the free exercise clause of the First Amendment of the United States Constitution."

Id.

Contrasting *Assemany* and the case *sub judice*, the Court of Special Appeals opined:

> "The difference between the case before us and *Assemany*, is that [Moersen] merely played the organ at various services, whereas in *Assemany*, the plaintiff

assumed a far more significant role in religion and liturgy. As the *Assemany* Court stated, the 'plaintiff was more than just an organist.' [Moersen], in the case at hand, was 'just an organist.' Beyond playing the organ and occasionally selecting which songs to play, there was no evidence that [Moersen] participated in services beyond that of playing the organ or that he was part of the ministry to spread the Catholic religion. He was not, for example, a choir director; nor was his position similar to that of the organist in *Assemany*. Again, the meager evidence before us to support the decision of the circuit court is the language of the contract, not the nature of the duties [Moersen] actually performed.

* * *

"Although [Moersen]'s duties were to 'support the Gospel message' through music and to 'encourage the congregation to assume an active part in their musical participation' at mass and other religious functions, there is no additional evidence that he did anything more than play the organ and occasionally sing during services. Aside from the broad language of the contract, there was no evidence that his primary duties consisted of spreading the Catholic faith; his role as organist did not play an integral or important role in religious ritual or worship. Consequently, [Moersen]'s position is distinguishable from that of *Assemany* and of choir directors. His basic duties were simply to play the organ at religious services."

Thus, the Court of Special Appeals held that Moersen's Title VII discrimination claim was not barred by the Free Exercise Clause of the First Amendment.

We agree with the Court of Special Appeals' assessment. Under the " primary duties" test, *see Rayburn*, 772 F.2d at 1169, to be deemed "non-secular," the respondent's role must

"consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision in religious ritual and worship." *Id.* Cognizant that the "function of the position" is of greater importance than "ordination," we simply are not convinced that the respondent's role was supervisory in any respect, involved any form of church governance, or directly required the teaching or the spreading of the religious faith.

The petitioners acknowledge the respondent's denials which contradicted the terms of his contract, namely that he did not discharge certain of the enumerated duties and further that he did not support the Gospel of the church that employed him and, indeed, was openly critical of the Catholic faith. Nevertheless, they maintain that the respondent did not "merely" play the organ. For this Court to make such a characterization, they submit, is to subjectively determine what the respondent's responsibilities were, something the Free Exercise Clause was designed to protect. Moreover, the petitioners point out that, as the Court of Special Appeals acknowledged, *654 "music plays a vital role in a number of religious faiths," including in the Catholic faith, where music has deep religious significance. Therefore, they caution, a ruling in the respondent's favor on the issue *sub judice* would endorse governmental interference with religion, something constitutionally prohibited.

Whatever the role of music in the Catholic faith, this case involves the ministerial exception. That, in turn, implicates and requires examination of the role the respondent plays in the church. Its application, notwithstanding the undesirability of judicial intrusion in church governance and decision making, requires an examination of a complainant's duties and the place of that position in the Church hierarchy; some level of review of the disputed employee's role in the church must be conducted in order to determine whether the "ministerial exception" applies.

It is not enough to say that Moersen's music is central to the church's method of worship; it would be just as easy to say that the manufacturer of the organ contributes to the church's worship, or that the people involved in the upkeep of the organ and worship place contribute to the church's ability to maximize the participation in religious ritual. Where does one draw the line?, that is the question. As stated in a case cited by the petitioners, *Musante v. Notre Dame of Easton Church*, No. 301-CV-2352, 2004 WL 721774, (D.Conn. Mar. 30, 2004), "the religious nature of the employer is not dispositive of the inquiry, since it is unlikely that a church custodian would ever be considered a ministerial employee."

The petitioners urge that, contrary to the reasoning of the Court of Special Appeals, the *Rayburn* primary duties test does not mean that, "participation alone [is] not enough." We do not agree. In *Rayburn*, the court considered whether the position of associate in pastoral care was important to the spiritual mission of the Seventh-day Adventist Church. 772 F.2d at 1169. Concluding that it was, the court stated:

> "The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of those problems. Never are people more in need of spiritual leadership than when they turn to a pastor for

> help in dealing with their most difficult moments. Finally, the selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consultation, example, and guidance in their own lives and in the life of the congregation as a corporate body."

Id.

While we cannot, and will not, comment on the effect that the respondent's organ music had on the congregation or the members of the choir, we do note that the significance of the respondent's position and the level of his participation is far different than the position occupied by the appellant in *Rayburn*. The respondent was not in absolute control of the music played, and he did not lead any choirs, teach any hymns, or control any part of the church services in which he participated. He was neither required to have specialized knowledge of the Catholic faith, nor expected to have any particular religious training. All he needed was knowledge of how to play an organ.

To be sure, as *Rayburn* recognizes, the ministerial exception does not apply only to those who have been ordained. Those persons who are not ordained and are untitled, but who, in essence, perform ministerial roles are also covered. 772 F.2d at 1168-69. On this point, the petitioners argue that the respondent's involvement with the church and in the services was essential, that "we couldn't have done this with a C/D player . . . [h]e didn't function like a wind-up music box . . . The position called for a human being." That the respondent, however, could have been replaced easily by another qualified organ player underscores the non-ministerial-like nature of his position. That the position requires a human being is not dispositive. It is significant that it does not

require a specific human being with specific religious-based qualification. His contract to the contrary notwithstanding, the duties that the respondent actually performed, while they occurred during church services, were not "ministerial" in any sense.

D.

The cases on which the petitioners rely, although supportive of the proposition that "despite its name, it is well-recognized that the 'ministerial' exception applies to lay employees in addition to ordained ministers and clergy members," do not mandate a different result in the case *sub judice*. They are distinguishable. In each, the subject job or position had a far greater significance to the religious mission than does the respondent's position and, thus, the ministerial exception was appropriately applied.

In *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 700 (7th Cir.2003), at issue was the role of "Hispanic Communications Manager" at a Catholic church, whose duties included:

> "composing media releases for the Hispanic community; composing correspondence for the Cardinal; developing a working relationship with the Hispanic media and parishes in the Hispanic community to promote Church activities; developing a working relationship with the Hispanic community to enhance community involvement; composing articles for Church publications; and translating Church materials into Spanish."

Id. The incumbent holder of that position claimed that she had been discriminated against based on her gender and race. *Id.*

Noting that "[i]n determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the

position," 320 F.3d at 703, citing *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 801, and stating the relevant inquiry, "whether Alicea-Hernandez's position as Hispanic Communications Manager can functionally be classified as ministerial," *id.* at 703, the court concluded that the appellant's position was covered by the exception. The court held:

> "the parties cite numerous cases dealing with positions such as teachers, music directors, and youth counselors, the cases provide limited guidance in making the determination required here. Unlike those positions, a press secretary is responsible for conveying the message of an organization to the public as a whole. A press secretary, as is evident from observing various public officials and entities, is often the primary communications link to the general populace. The role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance. As the D.C. Circuit stated, '[D]etermination of whose voice speaks for the church is per se a religious matter.' *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1356 (D.C.Cir.1990) (internal quotation marks omitted). Indeed, the rationale for the ministerial exception is founded upon the principle that 'perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.' . . .
>
> * * *
>
> " . . . [The appellant] served as a liaison between the Church and the community to whom it directed its message. As Hispanic Communications Manager, Alicea-Hernandez was integral in shaping the message that the Church presented to the Hispanic community. We therefore conclude that Alicea-Hernandez served a ministerial

> function for the Church and her Title VII claims are therefore barred by the First Amendment."

320 F.3d at 704 (footnotes and some citations omitted).

A teacher of English and religion at a Catholic school, who had been terminated by the Catholic school after she had publicly supported abortion, was held, in *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 344 F.Supp.2d 923, 925 (D.Del.2004), to be covered by the ministerial exception. 344 F.Supp.2d at 932. There, although not owned by the church, religious principles were taught at the school so as to "indoctrinate[ ] its students according to those principles." 344 F.Supp.2d at 926. The appellant acknowledged that her role was to "teach those religious principles and inculcate them in [her] students." *Id.*

The court decided that the ministerial exception applied to the school employee. It reasoned:

> "I am inclined to believe that a religion teacher at a parochial school does indeed fall within the ministerial exception, but I need not conclusively answer that question because, regardless of the answer, the deep respect for free exercise rights upon which the exception is based still requires extraordinary judicial caution when addressing claims by lay employees whose duties have religious significance. . . . Here, the alleged victim of gender discrimination was a parochial school teacher of religion and of English, the latter subject, as well as the former, giving rise to frequent discussion of moral issues, as both sides acknowledge. . . . Those religious implications are particularly clear in the circumstances of this case, in which the Plaintiff was fired during a controversy she helped create over the Catholic Church's long-established doctrinal opposition to abortion."

344 F.Supp.2d at 932-33.

The employee in *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 797 (4th Cir.2000) was the "Director of the Music Ministry," whose duties included:

> "The proposed job description provided that the Director would be . . . fully responsible for the Music Ministry of the Cathedral. It stated that the major duties of the position included: '[t]o assist in the planning of all Parish Liturgies; to direct the parish choirs; to teach the congregation to actively and vocally participate in the music of the Parish; to recruit and train cantors.' Austin's actual duties were then summarized in a handwritten document agreed to by her and Father Lewis. This document, like the proposed job description, assigned responsibility to Austin for the music program of the Cathedral and the Cathedral school. Among the duties listed were: teaching at the school; supervising and directing choirs; training cantors; and playing for holidays, weddings, and funerals. Austin was also required to approve music for weddings even if she was not available for the ceremonies. She was also made part of the Worship Committee and was required to attend the committee's monthly meetings and participate in seasonal liturgy planning."

213 F.3d at 798. She claimed that the church discriminated against her on the basis of sex. 213 F.3d at 797.

Focusing its analysis on "'the function of the position' at issue and not on categorical notions of who is or is not a 'minister,'" 213 F.3d at 801, and characterizing the proper inquiry as "'whether a position is important to the spiritual and pastoral mission of the church,'" *id.*, citing *Rayburn*, 772 F.2d at 1169 (internal quotation marks omitted), the court concluded that the ministerial exception applied. It explained:

> "The functions of the positions are bound up in the selection, presentation, and teaching of music, which is an integral part of Catholic worship and belief. . . . To

hold otherwise would require us to say that music is substantially devoid of spiritual significance in the life of the church. . . .

"At the heart of this case is the undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions. . . . It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty. . . .

* * * *

"Thus, inasmuch as Austin's duties involve the expression of the church's musical tradition, it is a fallacy to denominate them as merely secular. . . . The efforts of a music minister or teacher can thus influence the spiritual and pastoral mission of the church as much as one who would lead the congregation in prayer, preach from the pulpit, or teach theology in school.

"Austin was clearly a pivotal figure in most, if not all, aspects of the musical life of the Cathedral and school. The various job descriptions for the music ministry positions, though not dispositive, unmistakably evince the religious significance of her music ministry. Austin was required to assist in the planning of liturgies and was in charge of the parish choirs—functions at the very heart of the church's musical life. The positions also entailed responsibility for recruiting choir members, cantors, and special musicians. . . .

"The significance of Austin's role in the selection and presentation of religious music is highlighted by the interplay between music and other liturgical forms. The music at religious worship services is often tied to the seasons of the church year or the day's scripture read-

ings. Indeed, Father O'Connor stated in his affidavit that Austin's role at the three weekly worship services was 'to choose music that reflected and enhanced the theme of the Scriptures of the day and that would assist the assembly of believers in their individual journeys of faith.' Father O'Connor also stated that Austin was involved in planning music for the special seasons of the year, such as Christmas and Easter, and for special feast days such as the Feast of Christ the King and the Feast of Pentecost. And even where Austin did not select the music herself, the subtle judgments that accompany the presentation and interpretation of sacred music contribute to its spiritual effect.

"Austin also served as a representative of the church to the congregation. She played a prominent role in worship services and helped to lead the congregation in song. The significance of her role was reinforced by the fact that Austin was listed on the front page of the Parish bulletin under 'Parish Staff,' along with the parish priests and a Pastoral Associate/Director of Religious Education. Austin was thus a visible (and audible) sign of the church's work through music, as well as a leader of the congregation in the church's musical, and therefore spiritual, life."

* * * *

"Indeed, Austin's duties at the Cathedral school appear to have gone far beyond the teaching of music classes. As Austin herself points out in exhibits attached to her affidavit, she was responsible for the music program of the school and served as a resource person for all musical activities in the school. She also assisted in the music preparation for school liturgies and played the piano at Mass. Austin was responsible for the school choir and school handbell choir. These duties, coupled with the spiritual significance of her teaching role, ren-

> der her position at the Cathedral school 'ministerial' for purposes of the exception."

213 F.3d at 802-05.

In *Musante v. Notre Dame of Easton Church*, No. 301-CV-2352, 2004 WL 721774 (D.Conn. Mar. 30, 2004), the "Director of Religious Education at the Catholic church fell within the ministerial exception." 2004 WL 721774, *6-7. There, the employee, who was "the Director of Religious Education and Pastoral Assistant," claimed she had been the victim of age discrimination. Her duties were:

> "1) reading scripture and distributing Communion during the daily 7:30 a.m. Mass; 2) training eucharistic ministers and readers; 3) supervising the Lay Caring Ministry; and 4) visiting hospitals and homebound parishioners."
>
> "[U]ndertak[ing] a fact-specific inquiry . . . to determine whether her duties at Notre Dame can be said to be 'important to the spiritual and pastoral mission of the church,'" citing *Rayburn*, 772 F.2d at 1168-69, and stressing that her duties included reading scriptures and training ministers, the court held that the employee's job fell "easily under the rubric of teaching or spreading the faith." 2004 WL 721774, at *6.

Finally, the petitioners rely on *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 307 (4th Cir. 2004). In *Shaliehsabou*, the employee, an Orthodox Jewish man, a mashgiach, or " an inspector appointed by a board of Orthodox rabbis to guard against any violation of the Jewish dietary laws," 363 F.3d at 301, sought to assert the Fair Labor Standards Act against his employer, a nursing home, the Hebrew House of Greater Washington. Significantly, it was established that there was "no secular health or safety rationale for the work performed by the [m]ashgichim," 363 F.3d at 302, who " [is] qualified under Judaic law to supervise the

preparation of food to ensure that it is kosher," "must have a knowledge of the basic laws of kashruth," "generally have obtained their knowledge of the laws of kathruth through experience and study at 'yeshiva,'" and "possess the authority to enforce the laws of kathruth and make on-the-spot decisions based on their knowledge and understanding of the situation at hand." *Id.*

Citing the primary duties test established in *Rayburn*, the court opined:

> ". . . Shaliehsabou's duties required him to perform religious ritual. He supervised and participated in religious ritual and worship. Shaliehsabou was responsible for starting and kosherizing the ovens and cleansing kitchen utensils in accordance with the rules of kashruth. He also oversaw the preparation of kosher food, a key aspect of the Jewish halakha. . . . Importantly, it was his responsibility to consult with the Vaad for proper resolution of any concerns. In sum, we cannot say, given the importance of dietary laws to the Jewish religion, that the duties of mashgichim do not involve religious worship and ritual.
>
> "In addition to performing religious ritual, Shaliehsabou occupied a position that is central to the spiritual and pastoral mission of Judaism. As a juridical religion, Judaism is dependent upon compliance with its laws, including the kashruth, and Shaliehsabou was the vessel through whom compliance with the kashruth was ensured for residents at the Hebrew Home. . . . Shaliehsabou, through his mashgiach tasks, performed sacerdotal duties. As Shaliehsabou has admitted, in the Jewish faith, non-compliance with dietary laws is a sin. As explained above, Jews view their dietary laws as divine commandments, and compliance therewith is as important to the spiritual well-being of its adherents as music and song are to the mission of the Catholic

> church. In short, failure to apply the ministerial exception in this case would denigrate the importance of keeping kosher to Orthodox Judaism."

363 F.3d at 309.

Moersen was not required to have any specialized knowledge of the Catholic faith. Stated another way, his lack of knowledge of many aspects of the Catholic faith did not prevent him from doing his job. This is unlike the plaintiff in *Shaliehsabou*, who, without very specific training, would not have been permitted to hold the position of mashgiach, much less perform that role.

Further comparisons with the cited cases display key differences. Unlike the employee in *Alicea-Hernandez*, Moersen was not the "voice" of the church. It was the Cantor that led the Parish and choir in song, and Moersen merely accompanied him. Not only did he not preach or inculcate values, he did not decide how the message was expressed. He was not, as the employee in *Curay-Cramer* was, in a teaching role, in a position where his own beliefs affected his ability to perform his job.

Roman Catholic Diocese of Raleigh, N.C. has similarities to the case *sub judice*, to be sure, but there are key differences as well. Moersen was not a "music minister." He was not a "pivotal figure" at the church, did not plan any liturgies himself, and he was not in charge of the church's "musical life." He did not teach the choir any music, and he was not listed as Parish Staff.

The difference between the employee in Musante and Moersen is also dramatic. Moersen was not asked to train any ministers, and he was not in charge of reading scripture.

Furthermore, the cases involving an "employee in a musical position" that the petitioner cites to highlight the application of the ministerial exception do not further the petitioner's position.

Assemany v. Archdiocese of Detroit, 173 Mich.App. 752, 434 N.W.2d 233 (1988) does not stand for the general proposition that an organist position is covered by the ministerial exception. As the Court of Special Appeals explained, the court's holding that the organist was covered by the ministerial exception was based on reasons other than the employee's job title; the organist in *Assemany*, unlike the respondent, also was the head of the musical branch of the Catholic liturgy in the church, and had a "leadership role" in the parish. 434 N.W.2d at 238.

Similarly, in *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn.Ct.App.2004), the employee was the music director, "responsible for managing and rehearsing Hamline Methodist's choir, selecting and preparing music for regular Sunday services and other special services, playing the organ, and supervising other church music groups, such as the children's choir and the hand bell choir." 679 N.W.2d at 352. It was with reference to those duties that the court held that the ministerial exception applied:

> "We recognize that music generally has a central and substantial role in expressing religious faith; it is often described as a 'ministry of music.' Music addresses the religious needs of church members and plays an integral part of the worship program. Egan states that his responsibilities include 'selecting and preparing' music for religious services. Clearly, Egan had to be familiar with the corpus of church music and theology to select the proper music for such services. In performing this task, he is expected to consider the time in the church year, the scripture readings, the sermon topic, the church's basic faith principles, and other religious matters. That Title VII cases have considered music directors exempt from the protections of that act argues in favor of our concluding that a music director plays a religious role for [Minnesota Human Rights Act] pur-

> poses. Accepting the facts alleged in Egan's complaint as true, we cannot say the district court erred in finding as a matter of law that Egan was a religious employee."

679 N.W.2d at 356. Unlike the employee in *Egan*, the respondent did not lead any choirs, did not teach any music, and, with rare exceptions, the music he played was chosen for him.

In *Miller v. Bay View United Methodist Church*, 141 F.Supp.2d 1174 (E.D.Wis.2001), the church's "Music Director and Choir Director" alleged racial discrimination when he was fired by the church. 141 F.Supp.2d at 1175. The duties of "music Director and Choir Director" included "choos[ing] appropriate musical selections for the Sunday worship services and . . . prepar[ing] and direct[ing] the choirs in leading the congregation in song," "research[ing] the religious themes of the upcoming services in religious books . . . and . . . select [ing] music that coincided with the religious themes and meanings of that particular services," 141 F.Supp.2d at 1178, as well as " [e]ncourag[ing] and promot[ing] Music Ministry outreach." *Id.*

Noting that "[w]here an individual's employment responsibilities are sufficiently ecclesiastical, a court may determine that it is precluded from scrutinizing a religious institution's allegedly discriminatory action in the employment context," 141 F.Supp.2d at 1181, the court decided that, in the case before it, "more was required [of the employee] than mere musical ability." 141 F.Supp.2d at 1182. The court held:

> "The policy sections of both job descriptions state that music in worship rests upon the following 'music ministry keys.'—ministry, not performance, and members are more important than gorgeous music. Both job descriptions also contain a "Responsibilities and Expectations" section. The Director of Music job description includes two responsibilities which are of particular significance with respect to religious criteria. The Director must

'ensure appropriate music for all regular services of the church' and 'encourage and promote [m]usic [m]inistry outreach.'

"Additionally, one of the responsibilities of the Chancel Choir Director job is, where possible, to choose music to fit the liturgy and or the lectionary. The policies, responsibilities and expectations of the jobs demonstrate that the defendant expected that a music ministry role be fulfilled by the Director of Music and the Choir Director.

* * * *

"Based on the foregoing, this court concludes that the plaintiff engaged in traditionally ecclesiastical or religious activities." 141 F.Supp.2d at 1182-83.

In *Starkman v. Evans*, 198 F.3d 173 (5th Cir.1999), the "Choirmaster and Director of Music," brought an action against the church at which she was employed, alleging a violation of the Americans with Disabilities Act. 198 F.3d at 174. Concluding that the ministerial exception applied to that position, the court explained:

"Although Ms. Starkman argues that she was hired strictly on the basis of her qualifications as a choir director, it is clear that her job requirements went above and beyond mere musical issues. To be certified as a Director of Music Ministry, she was not only required to have a masters in music, but also extensive course work in Church Music in Theory and Practice, Choral Conducting, Worship, Choral Vocal Methods, Hymnology, Bible, Theology, Christian Education, and United Methodist History, Doctrine and Polity. The job description for Director of Music, states that 'the Director of Music is responsible for the planning, recruiting, implementing and evaluating of music and congregational participation in all aspects of this ministry at Munholland United Methodist Church.' Furthermore, there is no dispute that

religious music plays a highly important role in the spiritual mission of the church. Thus, it seems clear that the job specifications required Ms. Starkman to be educated in religion and serve as a spiritual leader.

"Second, to constitute a minister for purposes of the 'ministerial exception,' the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church. . . . Ms. Starkman had several religious duties and responsibilities. For example, she was required to plan worship liturgy, coordinate church and worship activities relating to the church's Music Ministry, rehearse with choirs and conduct those choirs, hire musicians and lower level music ministry directors, and write articles about the church's Music Ministry for the weekly church bulletin, introducing liturgical seasons for worship services. . . .

* * * *

"Third, and probably most important, is whether Ms. Starkman 'engaged in activities traditionally considered ecclesiastical or religious,' . . . including whether the plaintiff 'attends to the religious needs of the faithful,' . . . . While Ms. Starkman claims that attending to the 'religious needs of the faithful' was not a primary duty, she admits that she was designated to be a 'ministerial presence' to ailing parishioners on occasion. She also concedes that, for her and her congregation, music constitutes a form of prayer that is an integral part of worship services and Scripture readings.

"The evidence, when examined in the light most favorable to the Plaintiff, indicates that Ms. Starkman did serve as a spiritual leader and thus properly falls under the rubric of this court's ministerial exception."

198 F.3d at 176-77 (citations omitted).

The respondent was not required "to plan worship liturgy, coordinate church and worship activities relating to the church's Music Ministry, rehearse with choirs and conduct those choirs, hire musicians and lower level music ministry directors, and write articles about the church's Music Ministry for the weekly church bulletin. . . ."

Penultimately, the petitioners cite *Fassl v. Our Lady Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D.Pa. Oct. 5, 2005). In that case, the employee was the Director of Music of the church that dismissed her, allegedly in violation of the American with Disabilities Act. Responding to the complaint, the church alleged:

> "the necessary qualifications for its Director of Music go far beyond musical experience and skill. Rather, the qualifications for Director of Music include an ability to teach, to lead, and to evoke active participation of the people in all liturgical celebrations and an ability to work with the volunteers who freely give their time and talent to the group that the Church deems to be its music ministry. Thus, the position of Director of Music is significantly distinguished from that of purely custodial, clerical or office personnel. At this Church, the Director of Music reportedly requires a thorough 'understanding of and love for' the Liturgy of the Church and the relationship of music to the liturgical life of the Church."

In that case, the appellant herself admitted that her duties were ministerial in nature,

> "she played, sang and/or directed three to five masses per weekend, planned music for liturgies, scheduled and trained the cantors, directed multiple Church choirs, chaired the 'Renew 2000' liturgy team, and prepared and played for penance services, all school liturgies, all other Holy Days, and contemporary and teen music groups among her enumerated duties."

The employee did not refute or attempt to refute the allegations describing her role in the " musical ministry" of the church, leading the court to the conclusion that they were true. 2005 WL 2455253, at *9. That was, the court held, dispositive. *Id.*

In *Hope Int'l Univ. v. Superior Court of Orange County*, 119 Cal.App.4th 719, 14 Cal.Rptr.3d 643, 655 (2004), the court opined that " individuals whose function is essentially liturgical, that is, connected to the religious or worship service of the organization" are a " relatively easy case" of when the exception applies, and listed among the examples, "music and choir directors." That court also noted, however, that "purely secular work for a religious institution has been held not to come within the ministerial exception." 14 Cal. Rptr.3d at 656, *citing Smith v. Raleigh Dist. of N.C. Methodist Church*, 63 F.Supp.2d 694 (E.D.N.C.1999) (ministerial exception did not apply to church receptionist or pastor's secretary); *Lukaszewski v. Nazareth Hosp.*, 764 F.Supp. 57 (E.D.Pa.1991) (ministerial exception did not apply to director of plant operations at a religiously affiliated hospital). Here, Moersen was not a music director, he was not a choir director, and did not have any ministerial duties.

It is clear to this Court that the respondent did not perform any ministerial duties. As such, the ministerial exception does not apply to him, and he is free to pursue his employment discrimination claim.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED, WITH COSTS.

HARRELL, J., files dissenting opinion joined by RAKER and CATHELL, JJ.

Dissenting Opinion by HARRELL, Judge, which RAKER and CATHELL, JJ., Join.

I respectfully dissent. The Majority opinion, in the process of minimizing the role played by Moersen as the organist for

St. Catherine Labouré Parish ("the Parish"), as compared to more extensive musical ministry and other ecclesiastical positions examined by other courts, lost sight of the simple reality that because Moersen's "primary duties consist[ed] of . . . participation in religious ritual and worship, he . . . should be considered 'clergy.'" *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir.1985); *accord Montrose Christian Sch. Corp. v. Walsh*, 363 Md. 565, 590, 770 A.2d 111, 126 (2001). This is true regardless of whether one relies on the duties delineated in Moersen's employment contract, or the activities Moersen professes he actually performed as an employee. Accordingly, I believe that this Court should have accepted the Archdiocese of Washington's argument invoking the "ministerial exception" to the prosecution of Moersen's Title VII cause of action, reversed the judgment of the Court of Special Appeals, and affirmed the Circuit Court's grant of summary judgment.

I. The "Ministerial Exception"

As the Majority opinion necessarily acknowledges, there exists a "ministerial exception" to the application of the employment anti-discrimination measures codified in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1(a). The U.S. Supreme Court upheld, against Establishment Clause attack, this exception in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987), and this Court also adopted it in *Montrose Christian School Corp. v. Walsh*. The aim of the exception is to honor the promise of the Free Exercise Clause by placing sectarian matters outside of the subject matter jurisdiction of secular courts. *Bourne v. Ctr. on Children, Inc.*, 154 Md.App. 42, 54-55, 838 A.2d 371, 379 (2003).

The U.S. Court of Appeals for the Fourth Circuit declared that "[a]s a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or partici-

pation in religious ritual and worship, he or she should be considered 'clergy.'" *Rayburn*, 772 F.2d at 1169 (*quoting* Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L.Rev. 1514, 1545 (1979)); *accord Montrose*, 363 Md. at 590, 770 A.2d at 126. Rather than applying just to ministers and ordained clergy, the exception covers "any employee of a religious organization" engaged in the ministerial activities delineated by the Fourth Circuit in *Rayburn*. *Montrose*, 363 Md. at 590, 770 A.2d at 126; *see also Equal Employment Opportunity Comm'n v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir.2000) ("[T]he exception has not been limited to cases involving ordained ministers or priests, but rather requires a fact-specific examination of the function of the position."); *see generally Serbian E. Orthodox Diocese for the U.S. & Canada v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). The *Rayburn* court opined that "[t]his approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church." 772 F.2d at 1169.

II. Moersen's Employment Contract Indicates Clearly that His Position is "Ministerial"

In order to determine whether a given employee's position within a sectarian organization should be deemed "ministerial," many courts have been guided either by the language contained in the employment contract binding the religious organization and the employee, or by the job description created by the religious organization in summarizing the duties of the employee.

In *Diocese of Raleigh*, the Fourth Circuit reviewed "[t]he various job descriptions for the music ministry positions, though not dispositive," in ruling that a music director and music teacher at a Catholic church and elementary school fulfilled a ministerial role. 213 F.3d at 803. In *Tomic v.*

Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir.2006), Richard Tomic, a music director and organist for the Diocese of Peoria and St. Mary's Cathedral, sued both entities for discrimination when he was dismissed from employment. Judge Posner, writing for the U.S. Court of Appeals for the Seventh Circuit, turned to the job descriptions developed by the diocese and the church for guidance in determining that Tomic's position was truly ministerial. *Tomic*, 442 F.3d at 1037. In *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir.1991), a federal appellate court was persuaded by the job description of a hospital chaplain in designating that employee's position as ministerial. 929 F.2d at 362-63. In *Starkman v. Evans*, 198 F.3d 173 (5th Cir.1999), another federal appellate court utilized the job description of an employee's position in its analysis of whether that position was ministerial. 198 F.3d at 176. In *Shirkey v. Eastwind Community Development Corp.*, 941 F.Supp. 567 (1996), the U.S. District Court for the District of Maryland concluded that, based solely on the job description approved by the defendant religious organization, the position sought by a job applicant was not ministerial. 941 F.Supp. at 577-78. Another federal trial court, in *Miller v. Bay View United Methodist Church, Inc.*, 141 F.Supp.2d 1174 (E.D. Wis.2001), relied on the job description provided by the church in ruling that an employee's role was ministerial. 141 F.Supp.2d at 1181-82. Even in *Assemany v. Archdiocese of Detroit*, 173 Mich.App. 752, 434 N.W.2d 233 (1988), a case relied upon by the Majority opinion, the court took great pains to detail the contractual duties assigned to the organist, *Assemany*. 434 N.W.2d at 235-36. It was to those duties that the *Assemany* court looked in concluding that the organist position in that case was ministerial. 434 N.W.2d at 238.

A similar analytical approach is appropriate here. The case was disposed of in the Circuit Court on summary judgment. There was no genuine dispute between the parties as to Moersen's contractual duties. The Majority opinion quotes

Moersen's employment contract with the Parish with respect to his duties as " Organist/Pianist/Keyboard Accompanist:"

Job objectives:

To Support the Gospel message through the music ministry of Saint Catherine Laboure Church and to encourage the congregation to assume as active part in their musical participation at all liturgical parish functions.

Job description:

To provide Organ/Piano/Keyboard Music and/or musical accompaniment to both the congregation and the choirs of Saint Catherine Laboure Church at the 10:30 a.m., 12:00 noon and 1:15 p.m. Sunday services; to provide the same at the weekly Saturday 5:15 p.m. service; to provide same at special liturgical celebrations as listed below; to provide musical accompaniment for the congregation at the 7:00 p.m. Monday night weekly novena service.

2. *Responsibilities of the organist:*

a. To build and sustain congregational song at all liturgies.

b. To assist in selecting music associated with the worship at all liturgies in which he/she participates.

c. To assist in planning the music associated with the above mentioned liturgies.

d. To participate in special liturgical celebrations when requested, especially Christmas, Lenten and Easter liturgies, Confirmation, First Communion, and Reconciliation liturgies.

e. To work under the very general supervision of the choir directors of the Liturgical choir and the Hispanic Choir.

f. To attend parish staff meetings when appropriate.

3. *Related job requirements:*

a. The organist reports to the director of the choir concerning music and also has, as needed, access to the pastor who is ultimately the person to whom the organist must answer to regarding job related issues.

b. The organist shall be an ex officio member of all committees concerning liturgy.

c. The organist will accept engagements to assist at weddings and funerals and when he is unable to accept such engagements he will recommend suitable substitutes if he is asked to do so. The fees for these services will be a matter between the organist and the party requesting his services.

Maj. op. 399 Md. at 645-46, 925 A.2d 663-64.

As to these duties and responsibilities, it is clear to me that Moersen's position was of a ministerial nature. The objective of his position was "[t]o Support the Gospel message through the music ministry of Saint Catherine Laboure Church" and to encourage congregational participation in the liturgies though music. A position entailing the performance of religious music, for a church during its religious services, to a religious end cannot possibly be perceived as anything but religious. Moersen's contract tasked him with planning and playing music as an accompaniment to the religious hymns sung by the choir and the congregation. He was required to attend Parish staff meetings and was considered an ex officio member of all committees relating to the liturgies in which he performed. Under these circumstances, the contractual relationship between the Parish and Moersen steeped Moersen in duties and responsibilities "that primar[il]y . . . consist of . . . participation in religious ritual and worship. . . ." *Rayburn*, 772 F.2d at 1169.

The Majority opinion, however, ignored the overtly religious duties assigned to Moersen and instead accepted Moersen's characterization of his role at the Parish. Curiously, the Majority opinion, like the misguided intermediate appellate court here, neglected to consider the number of cases catalogued above where courts looked to the terms of an employee's contract or the job description applicable to the employee's position for guidance. The Majority opinion should not be allowed to escape the relevance of the employee's job description being a stronger consideration. In surveying analogous cases, the Majority opinion itself recites from at least four cases where an employee's job description was weighed explicitly by courts in making an assessment of whether a position was ministerial. Maj. op. 399 Md. at 649-52, 658-59, 665-66, 666-67, 925 A.2d at 666-67, 671, 675-76, 676 (*citing Assemany, Diocese of Raleigh, Miller, and Starkman*). Indeed, the Majority opinion is forced to acknowledge the religious nature of Moersen's job description, yet sidesteps it unsatisfactorily by relying on Moersen's incomplete job performance as reason, for purposes of its analysis, to ignore the religious duties the Parish entrusted to Moersen. Maj. slip op. 399 Md. at 656-57, 925 A.2d at 670 ("His contract to the contrary notwithstanding, the duties that the respondent actually performed, while they occurred during church services, were not ' ministerial' in any sense.").

III. Moersen's Role Solely as an Organist was Ministerial

Even with the Court majority confining its consideration to Moersen's averment that he only played the organ, I nonetheless conclude that his position was a ministerial one. My opinion is compelled by nothing less than the simple reality that playing the organ for religious services at a Catholic church is an important facilitation of the liturgies in which Moersen participated, obviously an activity "important to the spiritual and pastoral mission of the church." *Rayburn*, 772 F.2d at 1169.

Many jurisdictions have opined on the obvious sectarian significance of music as played during religious services. The Fourth Circuit, in *Diocese of Raleigh*, stated that it is an "undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred." 213 F.3d at 802; *see also Starkman*, 198 F.3d at 176 ("[T]here is no dispute that religious music plays a highly important role in the spiritual mission of the church."); *Tomic*, 442 F.3d at 1041. There is also no shortage of facts adduced by the Archdiocese of Washington that music occupies a scared position in Catholic worship. In particular, the Archdiocese asserted that "the pipe organ is to be held in high esteem, for it is the traditional musical instrument that adds a wonderful splendor to the Church's ceremonies and powerfully lifts up the spirit to God and to higher things." Constitution on the Liturgy, Sacrosanctum Councilium, 4 December 1963. Despite this convincing evidence,[1] both the Court of Special Appeals and the Majority in this Court downplay unsatisfactorily Moersen's role.

The fact remains that because music inheres a vital liturgical significance, the performance of that music is equally as significant. Although Moersen contends that he is "just an organ player," his apt performance of sacred and reverent music during worship services belies a secular characterization of his role. Moersen, as the organist, was an active participant in liturgies in a way that an organ manufacturer or a person who merely tunes the organ is not. *See Tomic*, 442 F.3d at 1041. Despite Moersen's arguments, I am persuaded that there is no such thing as "just an organ player" in religious rituals and ceremonies such as those in which Moersen performed. I am not alone in this view.

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[1] The Court of Special Appeals also accepted this and acknowledged that "music is generally an important part of the Catholic faith. . . ."

In *Tomic*, Richard Tomic, a music director and organist, portrayed his involvement with his church employer in much the same manner as does Moersen here:

> [s]o far as his role as organist is concerned, his lawyer says that all Tomic did was play music. But there is no one way to play music. If Tomic played the organ with a rock and roll beat, or played excerpts from Jesus Christ Superstar, at an Easter Mass, he would be altering the religious experience of the parishioners.

442 F.3d at 1040. In view of this reality, the Seventh Circuit held that "*Tomic* 'performed tasks that were "traditionally ecclesiastical or religious."'" *Tomic*, 442 F.3d at 1041. In *Diocese of Raleigh*, the Fourth Circuit noted of a music director tasked with selecting and playing music for worship services that "even when Austin did not select the music herself, the subtle judgments that accompany the presentation and interpretation of sacred music contribute to its spiritual effect." 213 F.3d at 803. The Diocese of Raleigh court then struck the same note as did the Tomic court in addressing the difficulty of accepting an argument such as Moersen's that simply playing the organ has no religious importance: Indeed, it is not easy to divorce even the more technical aspects of music from its significance in religious worship. Whether a selection is played *adagio* or *andante* can have a profound effect on the religious worship and vocal participation of the congregation. And different performances of the same musical piece can evoke different responses.

213 F.3d at 804. Even though Moersen did not also fulfill the role of music director, he nonetheless served, for all intents and purposes, as "the primary human vessel through whom the church chose to spread its message in song." *Id.* The role of church organist almost certainly would be in-cluded at the epicenter of religious activity as described by Professor Bagni, whom the Fourth Circuit quoted in *Rayburn* in setting

out the "primary duties" test.[2] G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 Emory L.J. 1189, 1210 (1994) (discussing Bagni, supra, 79 Colum. L.Rev.. at 1539).

Relatedly, I perceive that the Majority opinion makes too much of the leadership role and more extensive responsibilities of music directors and other ecclesiastical figures as contrasted to a "mere" organist in deciding whether either position is ministerial. As I have pointed out already, at least two federal appellate courts have noted that the manner in which religious music is played is, by itself, a matter of religious significance without regard to whether the performer selected that music. Further, the *Diocese of Raleigh* court opined that simply because an employee is answerable to a superior on spiritual matters, that fact does not de jure relegate that employee to any less of a religiously significant role; rather, it is just one factor to consider. 213 F.3d at 803. What is more important is whether the employee's "primary duties consist of . . . participation in religious ritual and worship." *Rayburn*, 772 F.2d at 1169.

It is telling that the "primary duties" inquiry was dispositive in one of the cases relied upon by the Majority opinion and the Court of Special Appeals. In *Assemany*, George Assemany served as music director and organist for Gesu Parish in the Detroit area. In finding that Assemany's position was ministerial, the Court of Appeals of Michigan held that he was "more than just an organist." 434 N.W.2d at 238. The Majority opinion incorrectly seizes upon this language as proof positive that all church employees, including Moersen,

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[2] *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir.1985) (*quoting* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L.Rev. 1514, 1545 (1979)).

who only play the organ, are not ministerial employees. To do so ignores the real test to be applied; the "primary duties" test, which was utilized in *Assemany*. In the paragraph preceding the "more than just an organist" language, the *Assemany* court found that the employee's "primary responsibility was to enable and encourage the Gesu choir and congregation to participate in the Catholic liturgy through song." 434 N.W.2d at 238. Surely, this same evaluation must be made of Moersen in his role as the organist at St. Catherine Labouré Parish. Although he alleges that he did not select the music to be played at liturgy, he nonetheless enabled and encouraged both the choir and the congregation to worship through music. Again, Moersen did not have to be in a position of leadership to impact the Parish's liturgies through his exercise of his primary responsibilities. *Diocese of Raleigh*, 213 F.3d at 803.

For the reasons expressed above, I would hold that Moersen's role was ministerial, thus placing his employment discrimination claim outside of our secular jurisdiction. Accordingly, the judgment of the Court of Special Appeals should be reversed and the matter remanded to that Court with directions to affirm the judgment of the Circuit Court for Prince George's County.

Judges RAKER and CATHELL authorized me to state that they join the views expressed in this dissent.

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 912
September Term, 2004

WILLIAM T. MOERSEN

v.

ARCHDIOCESE OF WASHINGTON *et al.*

Filed: JUNE 13, 2005

DAVIS, EYLER, DEBORAH S., BLOOM, THEODORE G. (retired, specially assigned) JJ.

Opinion by DAVIS, J.

On March 11, 2003, appellant, William Moersen, filed a complaint in the Prince George's County Circuit Court alleging breach of contract, wrongful discharge, and intentional infliction of emotional distress. After appellee, the Archdiocese of Washington (Archdiocese), filed a motion to dismiss the complaint, the circuit court granted leave to appellant to amend his complaint, which he did on October 21, 2003. On December 1, 2003, the Archdiocese filed a motion to dismiss the amended complaint, asserting that the circuit court lacked subject matter jurisdiction over the claim due to the Free Exercise Clause and Establishment Clause of the United States Constitution, as well as Article 36 of the Maryland Declaration of Rights. The circuit court denied appellee's motion on February 27, 2004. Appellee subsequently moved for sum-

mary judgment on May 3, 2004. A hearing was conducted on May 27, 2004, after which the circuit court granted appellee's motion.

Appellant filed a timely appeal and presents one question for our review, which we rephrase as follows:

> Did the circuit court err in granting appellee's motion for summary judgment?

We answer in the affirmative. Accordingly, we shall reverse the judgment of the circuit court.

FACTUAL BACKGROUND

Appellant was employed as an organist at St. Catherine Laboure Parish (Parish) from 1958 to 1976, as well as from 1991 to 2002. In July 2001, appellant entered into a written contract with the Parish to continue his duties as organist. The contract stated that appellant's job objectives were:

> To support the Gospel message through the music ministry of [the Parish] and to encourage the congregation to assume an active part in their musical participation at all liturgical parish functions.

The job description provided that appellant was to furnish organ music to the congregation and choir during numerous Saturday and Sunday services, for choir rehearsals twice a week, at special services (e.g. weddings), and for a weekly novena service.

According to the contract, his responsibilities included "build[ing] and sustain[ing] congregational song at all liturgies; assist[ing] in selecting [and planning the] music associated with the worship at all liturgies in which he/she participates; participat[ing] in special liturgical celebrations when requested; and "work[ing] under the very general supervision of the choir directors." His contract also required that he be "an ex officio member of all committees concerning liturgy."

Appellant contends, however, that he was not a supervisor and did not perform the majority of the duties described in his contract. He also professed that he was "openly critical of the Catholic faith" and, although conceding that music is an "important" part of the Catholic faith, he contends that his duties were not an "integral or pivotal role in [music] ministry."

Appellant alleges that, while he was employed at the Parish from 1958 to 1964, he was sexually abused by a choirmaster. He informed Parish Priest Father Robert Amey of the abuse in September 2001. Father Amey, in turn, offered to pay for counseling. At that juncture, appellant claims, "His employment situation began to deteriorate." On February 17, 2002, Father Amey terminated appellant's employment with the Parish.

After conducting a hearing on appellee's motion for summary judgment, the circuit court concluded:

> [T]here is no case one way or the other on this very point and on this position. But there is a law as it has been stated to date, which is *Montrose Christian School Corporation versus Walsh*. And that is the Maryland law to the extent there is any. It is with some, quite frankly, reluctance that I grant this motion for summary judgment, and I grant it for these reasons.
>
> * * *
>
> The Court of Appeals, as I have said, has quite broadly interpreted the free exercise law, the nostalgic law. And, basically, included in my opinion a position of this sort.
>
> Specifically, I am granting this motion for all of the reasons stated in the papers of [appellee] and the oral argument here this morning. But, in particular, the language in Montrose that says as follows: "That we cannot proceed without judiciary to determine whether an em-

ployment position concerning ministerial . . . was based on legitimate religion without asserting ourselves into a realm where the Constitution forbids us to tread, comma, the internal management of the church." "[D]ecisions about the appointment and removal of ministers . . . and persons in other positions of similar theological significance . . . are beyond the canon of civil court. Citing *E.E.O.C.* versus *Catholic University*.

[*E.E.O.C. versus Roman Catholic Diocese of Raleigh*] is persuasive. And it says, among other things . . . "our inquiries thus focus on the function of the position -" that issue as it does here "- and not on the categorical notions of who is or is not a minister.

[I]n general rule if the . . . employee's primary duties consist of teaching, which this is not, spreading the faith, which this is not, church government, which this is not, supervision of religious order, which this is not, or . . . participation in a religious ritual . . . and the argument is not whether he participates, but what is the nature of his participation? How meaningful is it?

"[A]nd his participation in religious ritual or worship, he or she should be considered clergy." A court must, therefore, determine whether a position is important to the spiritual or pastoral mission of the church in order to decide whether the ministerial exception applies.

[I] believe that the earlier holding is a broad one, that it encompasses [appellant] and his position . . . [M]y holding is what I believe they have held as we speak. And I believe that the position here is encompassed by the ruling in Montrose and its progeny.

And, for that reason, as again for all the reasons cited by [appellee] in their papers and in their oral argument this morning, the motion for summary judgment is granted.

LEGAL ANALYSIS

Appellant contends that the circuit court erred in granting appellee's summary judgment motion. We agree.

Summary judgment is appropriate if, when viewing the facts in a light most favorable to the opposing party, "there is no genuine dispute as to any material fact and that the [moving] party is entitled to judgment as a matter of law." Md. Rule 2-501 (a). See *Messing v. Bank of American, N.A.*, 373 Md. 672, 683-84 (2003). Of course, we review the circuit court's conclusions of law *de novo*. *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 162 (2004). Therefore, we must review "the same material from the record and decide[] the same legal issues as the circuit court." *Lopata v. Miller*, 122 Md. App. 76, 83 (1998). In reaching our conclusion, "we do not accord deference to the [circuit] court's legal conclusions." *Id.*

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const, amend. I. Article 36 of the Maryland Declaration of Rights embraces a similar guarantee of the free exercise of religion. The United States Supreme Court has interpreted the Free Exercise Clause to allow religious organizations the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). *See Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Combs v. Central Texas Annual Conference United Methodist Church*, 173 F.3d 343, 348 (5th Cir. 1999); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 463 (D.C. Cir. 1996); *Downs v. Roman Catholic Archbishop of Baltimore*, 111 Md. App. 616, 622 (1996).

The judiciary has subsequently carved out a ministerial exception for religious organizations, which "precludes the

application of . . . Title VII[1] . . . to employment decisions by religious organizations concerning ministers, teachers, and other employees whose duties are 'integral to the spiritual and pastoral mission' of the religious organization." *Montrose Christian School Corp. v. Walsh*, 363 Md. 565, 590 (2001) (*quoting E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 797 (4th Cir. 2000)). To determine if an employment decision falls within the exception, we must apply the primary duties test. This test involves an analysis of the functions of the position and the exception applies to employees whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Montrose*, 363 Md. at 590-91 (*quoting Raleigh*, 213 F.3d at 801). *See Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 306 (4th Cir. 2004;,-*Catholic University*, 83 F.3d at 461; *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *Bourne v. Center on Children, Inc.*, 154 Md. App. 42, 54 (2003).

This exception, however, is not limited to members of the clergy; in fact, it encompasses "all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." *Catholic University*, 83 F.3d at 463. *See Rayburn*, 772 F.2d at 1169; *Montrose*, 363 Md. at 592; *Bourne*, 154 Md. App. at 54. Indeed, the *Montrose* Court noted that the "free exercise guarantee restricts governmental interference with a religious organization's hiring and firing of employees who are involved in the religious activities of the organization." 363 Md. at 594.

In interpreting the ministerial exception, we shall not inquire into the reasons behind the organization's employment

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[1] Title VII makes it an unlawful employment practice to discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

decision, as the Free Exercise Clause "protects the act of a decision rather than the motivation behind it." *Rayburn*, 772 F.2d at 1169. *See Combs*, 173 F.3d at 350. Therefore, the Archdiocese need not offer a religious justification for its employment decision. *Raleigh*, 213 F.3d at 801. If the exception does not apply, however, the burden shifts to the employer to offer a legitimate, non-discriminatory reason regarding the adverse employment determination. *DeMarco v. Holy Cross High School*, 4 F.3d 166, 170 (2d Cir. 1993).

Of course, the ministerial exception does not apply to secular positions within a religious organization. *See Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994) (administrator at a Jewish temple); *DeMarco*, 4 F.3d 166 (teacher at a religious school); *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 1 F.3d 324 (3d Cir. 1993) (same); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (administrative and support staff at a seminary).

In this case, appellant was an organist at the Parish, who played at various religious ceremonies almost every day. The Fourth Circuit aptly observed, in *Raleigh*, that:

> [M]usic is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions. It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty . . . We refuse to demote music below other liturgical forms . . . Indeed, the inspirational appeal of religion in the guises of music, architecture, and painting is often stronger than in forthright sermon.

213 F.3d at 802 (citations omitted). See *Shaliehsabou*, 363 F.3d at 308; *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999).

We note that the Catholic Church has also recognized the importance of music in its celebrations.[2] Indeed, it has stated that "the pipe organ is to be held in high esteem, for it is the traditional musical instrument that adds a wonderful splendor to the Church's ceremonies and powerfully lifts up the spirit to God and to higher things," and "musical instruments as the accompaniment for singing have the power to support the voice, to facilitate participation, and to intensify the unity of the worshiping assembly." *Constitution on the Liturgy*, Sacrosanctum Concilium, 4 December 1963; *Musicam Sacram*, on music in the liturgy, 5 March 1967, Vatican Polyglot Press.[3] Father Amey's Affidavit also supported the Church's teachings, stating that "music is of great importance in the celebration of faith as it is intended to enhance the

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[2] *See Constitution on the Liturgy, Sacrosanctum Concilium*, 4 December 1963 ("The musical tradition of the universal Church is a treasure of inestimable value, greater even than that of any other art. The main reason for this preeminence is that, as sacred song closely bound to the text, it forms a necessary or integral part of the solemn liturgy."); *Secretariat of State*, Letter of Cardinal J. Villot to Cardinal J. Garibi y Rivera, Archbishop of Guadalajara, December 1969 ("It can never be sufficiently emphasized that sacred music is an integral part of the liturgy: it shares in the essence of the liturgy and becomes part of the very mystery of the liturgical celebration."); Pope Paul VI, Address to the 10th International Congress of Church Choirs, 6 April 1970 ("[M]usic [in the Church] remains, as it has always been, one of great importance and highest purpose. [It] will accompany the unfolding of the sacred rites and adorn the various types of the Church's prayer with the vibrant harmonies of song."); *Music in Catholic Worship*, The Theology of Celebration (1972) ("[M]usic . . . forms a necessary or integral part of the solemn liturgy [and] should assist the assembled believers to express and share the gift of faith that is within them and to nourish and strengthen their interior commitment of faith.").

[3] Consilium, Letter to the Italian conference of bishops, on liturgical music, 2 February 1968 ("The sound of the organ is extremely helpful, even indispensable, for worship in an assembly of the people, to help sustain the singing and to create an atmosphere of festiveness, joyous serenity, and recollection during the celebration, keeping with the established norms.")

devotion of its listeners" and the organ is "integral to the spiritual and pastoral mission not only of the local parish, but the universal Roman Catholic Church."

Although music is generally an important part of the Catholic faith, here, appellant's position fell outside the ambit of the ministerial exception. We explain.

In *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. App. 1989), the Michigan Court of Appeals affirmed the lower court's dismissal of an organist's employment discrimination claim against his church and the Archdiocese of Detroit. *Id.* at 234. In *Assemany*, the plaintiff argued that the position of organist was merely a secular position because, although he engaged in religious activities, he did not promote the church's faith or doctrine. *Id.* at 238. The Court disagreed and explained that:

> In the present case, plaintiff contends that he was merely the organist at Gesu, a secular employee who supported defendant's religious activities but did not engage in the propagation of religious doctrine or faith. We find that plaintiff's characterization of his function at Gesu is oversimplified.
>
> Plaintiff was required to have a working knowledge of the Catholic religion and liturgy. He was responsible for the selection and teaching of all liturgical music in the parish. His primary responsibility was to enable and encourage the Gesu choir and congregation to participate in the Catholic liturgy through song. Plaintiff assumed a pastoral-liturgical leadership role in the parish.
>
> On the basis of the facts of this case, we conclude that, while employed at Gesu, plaintiff was more than just an organist. He was the head of the musical branch of the Catholic liturgy here. Plaintiff was intimately involved in the propagation of Catholic doctrine and the

observance and conduct of Catholic liturgy by the Gesu congregation.

Id. at 238. Therefore, the Court concluded that, under *Rayburn*, the plaintiff was "clergy," and thus his Title VII discrimination claim was barred. *Id.*

The difference between the case before us and *Assemany*, is that appellant merely played the organ at various services, whereas in *Assemany*, the plaintiff assumed a far more significant role in religion and liturgy. As the *Assemany* Court stated, the "plaintiff was more than just an organist." Appellant, in the case at hand, was "just an organist." Beyond playing the organ and occasionally selecting which songs to play, there was no evidence that appellant participated in services beyond that of playing the organ or that he was part of the ministry to spread the Catholic religion. He was not, for example, a choir director; nor was his position similar to that of the organist in *Assemany*. Again, the meager evidence before us to support the decision of the circuit court is the language of the contract, not the nature of the duties appellant actually performed.

Akin to this case, in *Weissman*, the plaintiff was the temple administrator, whose duties included building maintenance, maintaining financial records, having a positive attitude about the Jewish faith and an understanding of its history, being the initial point of contact with prospective members, and promoting "a positive image of the temple among its members and to the general community by being accessible and knowledgeable." 38 F.3d at 1040.

The Court concluded that the plaintiff's relationship with the temple was not "so pervasively religious" that it would offend the First Amendment if the court engaged in an age-discrimination inquiry. *Id.* at 1045. In this case, appellant had a basic understanding of the Catholic faith and, by playing the organ, served to encourage the congregation to be

involved in services. But the primary functions of appellant's position, like those of Weissman, were not religious in nature.

Although appellant's duties were to "support the Gospel message" through music and to "encourage the congregation to assume an active part in their musical participation" at mass and other religious functions, there is no additional evidence that he did anything more than play the organ and occasionally sing during services. Aside from the broad language of the contract, there was no evidence that his primary duties consisted of spreading the faith; his role as organist did not play an integral or important role in religious ritual or worship. Consequently, appellant's position is distinguishable from that of *Assemany* and of choir directors. His basic duties were simply to play the organ at religious services.

Appellant's Title VII discrimination claim is thus not barred by the free exercise clause of the First Amendment of the United States Constitution.[4]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED.

COSTS TO BE PAID BY APPELLEE.

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[4] An analysis of appellant's claims under Article 36 of the Maryland Declaration of Rights would be duplicative, and therefore an analysis under Article 36 is unnecessary.

APPENDIX C

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAL03-04905

ROY MOERSEN,

Plaintiff,

v.

ARCHDIOCESE OF WASHINGTON, *et al.*,

Defendants.

REPORTER'S OFFICIAL
TRANSCRIPT OF PROCEEDINGS

(Motions Hearing)

Upper Marlboro, Maryland

Thursday, May 27, 2004

BEFORE:

Honorable STEVEN I. PLATT

APPEARANCES:

For the Plaintiff:

Jeanette Rice, Esquire

For the Defendants:

Emmet Flood, Esquire
Lisa Duggan, Esquire

* * *

THE COURT'S RULING

THE COURT: All right. As I said, I have read the cases cited as well as the papers filed, or the cases cited in the papers that have been filed, as well as the papers that have been filed. And quite frankly, when we were here earlier, I felt, as I said then—and subsequently scheduled and authorized limited discovery for this purpose—that a complete record should be made.

And as counsel for both sides concedes or suggests or boasts, there is no case one way or the other on this very point on this position. But there is the law as it has been stated to date, which is Montrose Christian School Corp. v. Walsh. And that is the Maryland law to the extent there is any guidance.

It is with some, quite frankly, reluctance that I grant this motion for summary judgment, and I grant it for these reasons. First, I do believe that perhaps the holding in Montrose arguably, as counsel for the plaintiff has argued, does allow the "exception to swallow the rule." But whether you want to characterize it that way or not, it is a broad holding. And it may be a constitutionally-compelled broad holding, but it is there. And I look for guidance on this position.

As far as the issue of the admissibility for this purpose, or ultimately if there were to be a trial, of the affidavit, I am able to distinguish opinion from fact. And I have considered that affidavit on a very limited basis. I can honestly say that my decision would not be changed were that affidavit not even there. But, it is a factor that I am considering.

I will also say that the position, obviously, is not like any other that has been considered, certainly not in this state, and perhaps in any state. But, there is some guidance. The Court of Appeals, as I have said, has quite broadly interpreted the

free exercise clause and the establishment clause, and basically included, in my opinion, a position of this sort.

Specifically, I am granting this motion for all of the reasons stated in the papers of the defendant and the oral argument here this morning, but in particular, the language in Montrose that says as follows. We cannot conceive of how the judiciary could determine whether an employment decision concerning a minister—and we will talk about that term in a minute—was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church, citing Bell v. Presbyterian Church, the citation of which is set forth.

It has, thus, become established that the decisions of religious entities about the appointment and removal of ministers—which, of course, this position is not—and persons in other positions of similar theological significance—It does not say equal. It does not say identical. It says similar—are beyond the can of the civil courts, citing EEOC v. Catholic University.

Now, what does that mean? And I recognize that the Montrose case was decided and the opinion issued on April the 12th, 2001. The Equal Employment Opportunity Commission v. The Roman Catholic Diocese of Raleigh, North Carolina was decided prior thereto. Nonetheless, its interpretation and language is persuasive. And it says, among other things, addressing the issue of what is and is not a minister for our purposes here today, it says our inquiry thus focuses on the function of the position at issue—as it does here—and not on the categorical notions of who is or is not a minister.

It then goes on to say, and I think this was true when the Raleigh case was decided, and it is still true, and it was certainly true when the Montrose case was decided. The general rule "if the employee's primary duties consist of

teaching," which his does not, "spreading the faith," which his does not, "church governance," which his does not, "supervision of a religious order," which his does not, or supervision, or emphasis by this court, "participation in a religious ritual," which it undoubtedly and without dispute does, and the argument is not whether he participates, but what is the nature of his participation, how meaningful is it. And then it goes on to say his participation in religious ritual and worship, he or she should be considered clergy. A court must, therefore, determine whether a position is important to the spiritual and pastoral mission of the church in order to decide whether the ministerial exception applies.

I think your record is there, Ms. Rice, and to the plaintiff, to the extent that this is, perhaps, a case where the Court of Appeals may want to either reconsider its broad holding or reinterpret it. But, that is not for me to do in this case. I believe that the holding is a broad one, that it encompasses this plaintiff and his position, and if they wish to reconsider their holding or reinterpret it or explain it, they may do so.

I think, probably, it is in the issue of both sides that if that is going to take place, that you are going to do that in this case, that you do it on this record. And then, if they disagree with my interpretation of their holding or reconsider it some other way, they may do so. But, my holding is what I believe they have held as we speak, and I believe the position here is encompassed by the ruling in Montrose and its progeny. Not progeny, it's predecessors.

I looked at, at counsel for the plaintiff's suggestion, that we put disposition on a continuum, and the spectrum as he used it is appropriate. I have done that in reaching this decision. And I believe that his argument that if you do that, it becomes even clearer what the ruling in this case must be at this time, is correct. And for that reason, as again, as well as all the reasons cited by the defendant in their papers and in the oral argument this morning, the motion for summary

judgment is granted. And I don't know whether I have a proposed order or not, but if I do, I will sign it. If I don't, I will ask the defendant to submit one.

MR. FLOOD: Thank you, Your Honor.

MS. RICE: Thank you.

THE COURT: There is a proposed order, and I am signing it as we speak.

MS. RICE: Thank you.

THE COURT: And that will be filed in the court jacket. Have a nice day.

MR. FLOOD: Thank you, Your Honor.

MS. RICE: Thank you, Your Honor.

(The proceedings concluded at 10:50 a.m.)

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No. 07-323

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON, *et al.*,

Petitioners,

v.

WILLIAM MOERSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Petitioners have presented compelling reasons to grant the Petition, where the Maryland Court of Appeals determined, after applying the "primary duties" test, that the ministerial exception did not apply to a church organist and the decision of the Maryland Court of Appeals does not conflict with a decision of this Court, a federal court, or another state court of last resort, and the decision does not implicate an important, unsettled federal question.

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INTRODUCTION

The Petitioners have failed to demonstrate that there is any need to "clarify the scope of the ministerial exception". As the Petitioners correctly point out, the ministerial exception springs directly from prior precedent of this Court. *See Watson v. Jones*, 80 U.S. 679 (1871) and *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.* 344 U.S. 94 (1952). There is no confusion among state and federal courts as to which employees the ministerial exception applies. The federal and state courts have embraced the "primary duties" test set forth in *Rayburn v. Gen. Conference of Seventh Day Adventist*, 772 F.2d 1164 (4th Cir. 1985) as the means of determining which employees fall into the ministerial exception. Petitioners are simply dissatisfied with the results of the application of the "primary duties" test by the Maryland Court of Appeals to the Respondent's position and they wish to broaden the scope for their own self interests. If the Petitioners' overly broad interpretation of the ministerial exception was adopted virtually every employee of the church would fall into the ministerial exception.

Petitioners also contend that this Court should grant the Petition to clarify the scope of the ministerial exception because the decision of the Maryland Court of Appeals is in conflict with the decisions of the federal and state courts. However, there is no conflict between the Maryland Court of Appeals and the decision of any other court regarding the ministerial exception. The Maryland Court of Appeals in its decision clearly considered prior federal precedent and utilized the "primary duties" test set forth by the Court of Appeals

for the Fourth Circuit in *Rayburn* in coming to the conclusion that the Respondent's position did not fall within the ministerial exception. The Maryland Court of Appeals did not reject any federal court precedent or create new precedent in coming to its decision.

STATEMENT OF THE CASE

St. Catherine Laboure Parish ("the Parish") employed the Respondent, William Moersen ("Mr. Moersen"), at various times over a period of twenty-nine (29) years, from 1958 to 1976, and again from 1991 to 2002. Maryland Court of Appeals Joint Record Extract ("R") E 25-26. On or about July 11, 2001, Mr. Moersen and Robert Amey, on behalf of the Parish, entered into an employment contract for the services of Mr. Moersen as organist/pianist/keyboard accompanist at the Parish at a salary of Twenty Six Thousand Five Hundred Dollars ($26,500.00) per year and other remuneration including health, disability and retirement benefits. R. E 23.

The employment contract between Mr. Moersen and the Parish provided that "[b]y mutual agreement the parties to the contract may terminate this contract in writing with advance notice of 90 calendar days". R. E 20-21.

The employment contract also contained job objectives which Mr. Moersen was not required to perform and had never been required to perform in the past. Mr. Moersen's duties and responsibilities at St. Catherine Laboure were to provide Organ/Piano/Keyboard music and/or musical accompaniment to both

the congregation and the choir(s) of St. Catherine Laboure Church at the 10:00 a.m., 12:00 noon, and 1:15 p.m. Sunday services; to provide the same at the weekly Saturday 5:15 p.m. service; to provide musical accompaniment for the weekly choir rehearsals on Tuesday evenings and Friday evenings; to provide musical accompaniment at special services when requested and to provide musical accompaniment for the congregation at the 7:00 p.m. Monday night weekly novena service. R. E 47-48.

Mr. Moersen did not plan nor select the music associated with the worship at any of the liturgies. The music planning and selection was done by either the Music Director or choir director(s). R. E 49.

Mr. Moersen never performed any duties in a leadership, teaching or training capacity and there were no individuals, including but not limited to employees, congregation members or students, under his supervision. R. E 50.

Mr. Moersen was not required to attend staff or committee meetings, and was not listed as a staff member on the church directory of St. Catherine Laboure. R. E 50.

Mr. Moersen was not required to profess, support or become a member of the Catholic faith. Mr. Moersen also performed as organist or pianist for other religious groups including Jews, Moslem and Hindu and was never required to profess, support or be a member of any of these faiths to perform as pianist or organist. R. E 50-51.

Mr. Moersen originally began working at the Parish in 1958 as an organist, when he was eleven (11) years

old. At or around that same time, the Parish hired a choirmaster who sexually abused Mr. Moersen, from 1958 through 1964. These acts of sexual abuse of Mr. Moersen occurred at the Parish itself during church services, at church-sponsored functions, and at other locations. Beginning in 1958 and through 1964, Mr. Moersen communicated to at least four (4) different priests that he was being abused. All of these priests praised him for his honesty and advised Mr. Moersen to get himself out of the situation. However, the Parish never took any action against the offender. R. E 24.

In 2001, Robert Amey was the Pastor in charge of Saint Catherine Laboure Parish and, as such, had the power to hire and discharge parish employees, including Mr. Moersen. On or about September 2001, Mr. Moersen informed Robert Amey that he had suffered sexual abuse at the hands of a choirmaster from 1958 to 1964. R. E 24.

Mr. Moersen confided in Robert Amey as a counselor and a church leader regarding the horrific abuse he has suffered as a child. Mr. Moersen was seeking counseling and assistance from Robert Amey as his superior. Mr. Moersen requested that Robert Amey relay his allegations of abuse to church superiors and Robert Amey assured Mr. Moersen that he would report the allegations of abuse. R. E 24.

Immediately after reporting the sexual abuse to Robert Amey in September 2001, Mr. Moersen's employment situation began to deteriorate in that Robert Amey's treatment of Mr. Moersen changed. After September 2001, it became evident to Mr. Moersen that

Robert Amey intended to terminate his employment. Robert Amey had begun to find fault with Mr. Moersen shortly after Mr. Moersen had informed Robert Amey of his childhood sexual abuse. Prior to this time, Mr. Moersen's performance record had been exemplary and Mr. Moersen had never received a negative performance evaluation or warning in his twenty-nine (29) years of employment with the Parish. R. E 25.

In November 2001, Robert Amey suggested to Mr. Moersen that he should retire from his position with the Parish. Robert Amey also offered to pay Mr. Moersen up to $2,000.00 to seek psychiatric counseling. R. E 25. On February 17, 2002, Robert Amey terminated Mr. Moersen's employment, unilaterally and with no advance notice. R. E 25.

On March 11, 2003, Mr. Moersen filed a Complaint filed with the Circuit Court for Prince George's County, Maryland, *pro se*. R. E 6. The Complaint alleged breach of contract, wrongful termination and intentional infliction of emotional distress against the Petitioners, Archdiocese of Washington, Reverend Robert Amey and St. Catherine Laboure. R. E 6. On October 12, 2003, Mr. Moersen filed an Amended Complaint. R. E 23. On December 1, 2003, Petitioners filed a Motion to Dismiss Amended Complaint which was denied by Judge Platt on March 22, 2004. R. E 2, 5. Petitioners then filed a Motion for Summary Judgment on May 3, 2003 which was granted by Judge Platt after oral arguments on May 27, 2004. R. E 52-53.

Mr. Moersen filed a Notice of Appeal to the Court of Special Appeals on June 23, 2004 of Order dated May

27, 2004, granting Defendants' Motion for Summary Judgment and dismissing the Amended Complaint. R. E 54.

In an unpublished opinion, the Court of Special Appeals reversed the holding of the trial court finding that the ministerial exception did not apply to the duties of Mr. Moersen as the organist for St. Catherine Laboure. While the Court of Special Appeals acknowledged that music was generally an important part of the Catholic faith, the court found that Mr. Moersen's "position fell outside the ambit of the ministerial exception" App. 53a. The Court of Special Appeals contrasted Mr. Moersen's position with the organist/music director in *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. App. 1989) and found that Mr. Moersen merely played the organ at various services, while the in *Assemany*, the organist/music director "had assumed a far more significant role in religion and liturgy." App. 54a.

The Petitioners filed a writ of certiorari with the Maryland Court of Appeals which was granted on October 3, 2005. The Maryland Court of Appeals affirmed the decision of the Court of Special Appeals in a 4-3 decision agreeing that Mr. Moersen's position was not covered by the ministerial exception. App 13a.

REASONS FOR DENYING THE PETITION

Petitioners have presented no "compelling reason" for this Court to grant their Petition for Writ of Certiorari as required by Supreme Court Rule 10. The Petitioners fail to demonstrate that the decision of the Maryland Court of Appeals is in conflict with a decision of this Court or another Court of Appeals or that the Maryland Court of Appeals decided an important federal question that has not been settled by this Court. See Sup. Ct. R. 10(a)-(c).

I. The Scope Of The Ministerial Exception Is Well Established And Needs No Clarification

The Maryland Court of Appeals adopted and applied the "primary duties" test set forth in *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) and adopted by the federal courts. In reaching its decision, the Maryland Court of Appeals was clearly guided by the United States Constitution and precedents from this Court and the federal courts. This is verified by the Maryland Court of Appeals recounting in its opinion the origin of the ministerial exception and its constitutional implications. App. 2a-7a.

The ministerial exception finds its roots in the Free Exercise Clause of the First Amendment which provides religious institutions with significant freedoms with respect to matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Downs v. Roman Catholic Archbishop of Baltimore*, 111 Md. App. 616 (1996).

Churches have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Similarly, Article 36 of the Maryland Declaration of Rights limits governmental interference with the internal management of religious organizations.

In adherence to the constitutional principles of free exercise of religion, the federal courts have carved out a ministerial exception to otherwise neutral employment laws, allowing religious institutions to select their clergy members without fear of reprisal from civil courts. In addition to ordained ministers, the ministerial exception has been extended by the courts to include employees whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," or any position that is "important to the spiritual and pastoral mission" of the religious organization. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

The ministerial exception exempts from coverage of employment laws the relationships between religious institutions and their ministers. See, *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997). The exception applies to employment decisions by religious organizations concerning ministers, teachers, and other employees whose duties are "integral to the spiritual and pastoral mission" of the religious organization. *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000).

While the ministerial exception shields certain employment decisions from the scrutiny of civil authorities to preserve the independence of religious institutions in performing their spiritual functions, if no spiritual function is involved, the First Amendment does not bar the application of generally applicable laws to religious employers. *Rayburn v. Gen. Conference of Seventh Day Adventist*, 772 F.2d 1164 (4th Cir. 1985).

The courts have held that the ministerial exception does not apply to employment decisions concerning employees that function in secular, lay, custodial or administrative capacities. The courts have held that a church's employment practices may be scrutinized where it does not involve the church's spiritual functions. See *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (Title VII could be applied to promotion of secular teacher in religious educational institution); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (Title VII applicable to administrative and support staff at a seminary); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *Whitney v. Greater New York Corporation of Seventh-day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist).

The courts have developed a "primary duties" test to determine if a particular job falls into the ministerial exception. In applying the "primary duties" test, the court must examine the functions of the position. The application of the ministerial exception is not unlimited and its application in any case requires a fact-specific examination of the functions of the particular position. *Rayburn, supra.*

This decision by the Maryland Court of Appeals demonstrates that the application of the "primary duties" test is sufficient to prevent excessive governmental entanglement into religious affairs. Federal and state courts have applied the "primary duties" test in many other instances and reached the determination that other church or religious employees were not covered by the ministerial exception. These prior decisions did not create excessive governmental entanglement which would violate the First Amendment of the United States Constitution.

The courts have determined in a number of contexts that where the employee does not fall into the ministerial exception, the United States Constitution does not deprive the courts of jurisdiction over employment controversies. The courts have allowed non-ministerial employees to maintain suits against religious organizations under Title VII, Fair Labor Standards Act and the Age Discrimination in Employment Act without creating excessive governmental entanglement in religion. *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993); *Weissman v. Emeth*, 38 F.3d 1038 (8th Cir. 1994); *Demarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993) and *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1398 (4th Cir. 1990), the court determined that application of the Fair Labor Standards Act ("FLSA"), to a church school did not violate the Free Exercise of Religion or the Establishment Clause of the First Amendment. Similarly, in *Weissman v. Emeth*, 38 F.3d 1038 (8th Cir.

1994), the court found that the Age Discrimination in Employment Act ("ADEA"), applied to a Jewish Temple and did not violate the First Amendment especially when the Temple had not advanced any religious reasons for terminating Weissman.

In *Weissman*, the court found it significant that the employer did not assert any religious reason for terminating Weissman, stating, "in the present case, the Temple failed to allege any deficiencies in these arguably religious duties or to assert any other religious reasons for Weissman's termination." The court concluded that the ADEA was applicable where an employee is not a member of the clergy and none of the asserted reasons for termination rested on religious grounds. *Id.*

In *Smith v. Raleigh Dist. of N.C. Methodist Church*, 63 F. Supp. 2d 694 (E.D. N.C., 1999), the court, in a Title VII case, examined the plaintiff's claims and found that the Church had not shown how any particular religious doctrine of belief would be implicated by the court assuming jurisdiction over the suit. The court found that the matter could be resolved "by reference to neutral principles of law." *Id.* at 714. The court also stated that litigation itself is not improper entanglement "where the litigation does not impinge upon core ecclesiastical matter." *Id.* at 718.

In the instant matter, Respondent filed a Complaint in the Circuit Court for Prince George's County, Maryland, *pro se*, on March 11, 2003. R. E 6. The Complaint alleged breach of contract, wrongful termination and intentional infliction of emotional distress against the Petitioners. The Respondent's

claims can be decided utilizing generally applicable, neutral principals of law. The Respondent's claims are based on traditional legal concepts of contract and tort law and do not require the court to examine any aspect of church doctrine or governance.

The Maryland Court of Appeals considered and followed clear precedents regarding the ministerial exception and the "primary duties" test set out by the federal courts in reaching its decision. This decision does not demonstrate that there is a need for clarification of the ministerial exception but shows that the "primary duties" test set forth by the federal appeal courts properly balances the First Amendment rights of religious employers and the rights of employees.

II. The Maryland Court Of Appeals Decision Is Not In Conflict With The Decisions Of Any Other Court

The decision of the Maryland Court of Appeals is not in conflict with a decision of this Court, a federal court, or another state court of last resort. Contrary to the Petitioners' assertion, the Maryland Court of Appeals only declined to apply the ministerial exception to the Respondent's position after that court carefully reviewed and considered the precedents of federal and state courts regarding application of the ministerial exception. The Maryland Court of Appeals then analyzed the Respondent's position under the "primary duties" test and considered each aspect of the test in reaching its ultimate decision that the Respondent's position did not fall within the ministerial exception.

In *Starkman v. Evans*, 18 F. Supp. 2d 630 (E. D. La. 1998), the court set out a three-pronged test based on *EEOC v. Southwestern Baptist*, 651 F.2d 277 (5th Cir. 1981):

> "One factor is whether the employment decision regarding the position at issue are made "largely on religious criteria"." (quoting *Southwestern Baptist*, 651 F.2d at 283). *Id.* at 633.
>
> A second consideration is whether the plaintiff was "qualified and authorized to perform the ceremonies" of the Church. (quoting *Southwestern Baptist*, 651 F.2d at 284). *Id.* at 634.
>
> The third and most pertinent factor is whether plaintiff is "engaged in activities traditionally considered ecclesiastical or religious"". (quoting *Southwestern Baptist*, 651 F.2d at 284). *Id.* at 634.

Because the Respondent was not ordained clergy and his job duties are not obviously ministerial in nature, the Maryland Court of Appeal engaged in a fact-specific inquiry of the Respondent's job duties before making a determination as to whether the ministerial exception would apply. The Court of Appeals stated:

> "Central to determining whether the ministerial exception applies in the case *sub judice* is deciding what, in fact, Moersen's role was in the church, which, in turn, requires an assessment of his duties." App. 11a.

The Maryland Court of Appeals first started with an analysis of the Respondent's position in the church and determined, by the abundant factual evidence in the record, that the Respondent played the organ, piano and keyboard during religious services and at other times as required. At the time of his termination, the Respondent worked under an employment contact which enumerated specific duties. Petitioners argued that duties specified in The Respondent's employment contract were sufficient to show that The Respondent's position was ministerial. However, the record showed that the Respondent was not required to perform any of the job duties specified in his contract other than playing the piano, keyboard and organ as directed and this was undisputed by the Petitioners. *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. 2007). App. 11a and 17a.

Petitioners prepared Respondent's contract and Petitioners' attempt to designate the job as ministerial through the contract is not dispositive. In *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), the court stated that, "[w]hile religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." *Id.* at 283. The Maryland Court of Appeals, after examining the facts in the records, applied the "primary duties" test to the Respondent's actual job duties as opposed to the one's specified in the employment contract.

The Respondents also argue that the Maryland Court of Appeals has reached a different result from

other courts who have considered whether a church organist was a ministerial employee. An examination of those cases show that the positions held and duties performed by the plaintiffs in those cases were significantly different from that of the Respondent in this case.

The Maryland Court of Appeals stated:

> "The cases on which the petitioners rely, although supportive of the proposition that "despite its name, it is well recognized that the 'ministerial' exception applies to lay employees in addition to ordained ministers and clergy members," do not mandate a different result in this case *sub judice*. They are distinguishable. In each, the subject job or position had a far greater significance to the religious mission than does the respondent's position and, thus, the ministerial exception was appropriately applied." App. 20a.

It is clear that under the application to the "primary duties" test the Respondent's position would never be considered ministerial. To circumvent this obvious conclusion the Petitioners have argued that the Respondent's mere participation in religious worship or ritual made his position ministerial under the "primary duties" test. The Maryland Court of Appeals disagreed. A review of the state and federal precedent show that the Petitioners' position is not supported as no court has ever held that mere participation in religious worship or ritual is sufficient to make a position ministerial.

The Maryland Court of Appeals contrasted the position of the Respondent with the position discussed in *Rayburn* and stated:

> "[W]e do note that the significance of the respondent's position and the level of participation is far different than the position occupied by the appellant in *Rayburn*. The respondent was not in absolute control of the music played, and he did not lead any choirs, teach any hymns, or control any part of the church services in which he participated. He was neither required to have a specialized knowledge of the Catholic faith, nor expected to have any particular religious training. All he needed was knowledge of how to play an organ." *Archdiocese of Washington, v. Moersen*, 925 A.2d 659, (Md. 2007). App. 19a.

In *Starkman*, the court concluded, after applying the three-pronged test, that the plaintiff's position as a music director was ministerial because the plaintiff played an integral role at the church. However, the court cautioned that the decision did not mean that every music director at every church was a ministerial employee. *Id.* at 635. In particular, the court pointed to *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994), which held that the position of Jewish temple administrator was not ministerial because the administrator "played no role in decisions relating to spiritual matters." *Id.* at 1040.

The Respondent's position as organist/pianist/keyboardist can be easily distinguished from the

leadership position of the Musical Director held by both plaintiffs in *EEOC v. The Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000) and *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. 1989).[1]

In *Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000), the court in examining the duties of the plaintiff, who served as the Director of Music Ministries for the parish, stated:

> "Austin was clearly a pivotal figure in most, if not all, aspects of the musical life of the Cathedral and school. The various job descriptions for the music ministry positions, though not dispositive, unmistakably evince the religious significance of her music ministry. Austin was required to assist in the planning of liturgies and was in charge of the parish choirs — functions at the very heart of the church's musical life. The positions also entailed responsibility for recruiting choir members, cantors, and special musicians. The job description for the new music ministry position sought by Austin — which Austin claims was essentially the same as her own job description— emphasized that this "liturgical

1. All of the cases cited by Petitioners involve music directors. *See Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App. 1988) (Music Director); *Miller v. Bay View United Methodist Church*, 141 F. Supp. 2d 1174 (E.D. Wis. 2001) (Choir Director and Music Director); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253, at E.D. Pa. Oct. 5, 2005) (Director of Music).

> minister" must "assist in developing a prayerful, singing assembly" and "support the Gospel message through song and challenge the assembly to live it more fully." The description also conferred upon the Director of Music Ministries responsibility "for all music associated with worship" and detailed a number of duties relating to the selection and presentation of liturgical music." *Id.*
>
> "Austin also served as a representative of the church to the congregation. She played a prominent role in worship services and helped to lead the congregation in song." *Id.*
>
> "These duties, *coupled* with the spiritual significance of her teaching role, render her position at the Cathedral school "ministerial" for purposes of the exception." *Id.* (Emphasis supplied).

The Maryland Court of Appeals noted that while there were some similarities between these two cases, "there are key differences as well. Moersen was not a "music minister". He was not a "pivotal figure" at the church, did not plan any liturgies himself, and he was not in charge of the church's "musical life". He did not teach the choir any music, and he was not listed as Parish Staff." App. 28a.

In *Assemany*, 434 N.W.2d 233 (Mich. 1989), the plaintiff served in a leadership position as the Musical Director for the parish. The plaintiff was not merely an "organist" but had complete responsibility for all liturgical music for the parish. *Id.* at 234.

In recounting the plaintiff's duties the court stated:

> "Plaintiff was required to have a working knowledge of the Catholic religion and liturgy. He was responsible for the selection and teaching of all liturgical music in the parish. His primary responsibility was to enable and encourage the Gesu choir and congregation to participate in the Catholic liturgy through song. Plaintiff assumed a pastoral-liturgical leadership role in the parish. He was the head of the musical branch of the Catholic liturgy there. Plaintiff was intimately involved in the propagation of Catholic doctrine and the observance and conduct of Catholic liturgy by the Gesu congregation." *Id.*

The Maryland Court of Appeals comparing the position of the Respondent to the plaintiff in *Assemany* rejected Petitioner's position and concluded that the case:

> "does not stand for the general proposition that an organist position is covered by the ministerial exception. As the Court of Special Appeals explained, the court's holding that the organist was covered by the ministerial exception was based on reasons other than the employees job title; the organist in *Assemany*, unlike the respondent, also was the head of the musical branch of the Catholic liturgy in the church, and had a "leadership role" in the parish." App. 29a.

Petitioners also argued that music is integral to the spiritual and pastoral mission of the Catholic Church. The Maryland Court of Appeals agreed that while music is important to the Catholic Church, this alone was not dispositive, but an examination of the role the Respondent played in the Church's music ministry was required.

> "Similarly, in *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App.2004), the employee was the music director. "responsible for managing and rehearsing Hamline Methodist's choir, selecting and preparing music for regular Sunday services and other special services, playing the organ, and supervising the other church music groups, such as the children's choir and the hand bell choir." It was with reference to those duties that the court held that the ministerial exception applied." *Archdiocese of Washington, v. Moersen*, 925 A.2d 659, (Md. 2007). App. 29a.

The Maryland Court of Appeals also concluded that the position of Mr. Moersen was different from the position of the plaintiffs in *Musante v. Notre Dame of Easton Church*, No. 310-CV-2352, 2004 WL 721774 (D. Conn. Mar. 30, 2004) a Director of a Religious Education who trained ministers; *Miller v. Bay View United Methodist Church*, 141 F. Supp. 2d 1174 (E.D. Wis. 2001), a church music director and *Fassl v. Our Lady Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005), a Director of Music.

An examination of the cases discussing the "primary duties" test show that not only must the music ministry of the church be integral to the spiritual and pastoral mission of the church, The Respondent must also play an integral or pivotal role in ministry before his position can be considered ministerial. To hold otherwise would make the ministerial exception overly broad. See, *Dole v. Shenandoah Baptist Church*, *supra*.

The Respondent's limited duties of organist/pianist/keyboardist are not the integral duties that have been determined by the courts to be ministerial in nature. The difference between The Respondent's position and that of an employee serving an integral role is illustrated by *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003). In *Alicea-Hernandez*, the court ruled that the Hispanic Communications Director was a "minister". The court pointed out that Alicea-Hernandez served as a "liaison between the church and the community" and was "integral in shaping the message that the church presented." The court however, pointed out that if Alicea-Hernandez simply served as translator, then her position would not have been ministerial. Under Petitioners' broad interpretation of the primary duties test, even a translator's position would be ministerial if the translator translated during the church services.

The Maryland Court of Appeals compared the Respondent's position to the plaintiff in Alicea-Hernandez, and concluded that there were key differences in these positions:

> "Unlike the employee in *Alicea-Hernandez*, Moersen was not the "voice" of

> the church. It was the Cantor that led the Parish and choir in song, and Moersen merely accompanied him. Not only did he not preach or inculcate values, he did not decide how the message was expressed." App. 28a.

In *Shaliehsabou v. Hebrew Home of Greater Washington, Incorporated*, 363 F.3d 299 (4th Cir. 2004). The court discussed in great detail the requirements for the ministerial exception. The court found that the position of a Jewish Mashgiach or kosher food supervisor was ministerial. In discussing the role of the Jewish Mashgiach, the court noted that "Shaliehsabou, like the Director of Music Ministry in Diocese of Raleigh, is the primary human vessel through whom the Hebrew Home chose to assure that the Jewish dietary laws were followed." *Id.* at 308.

The Maryland Court of Appeals in comparing the position of the Respondent to that of the plaintiff in *Shaliehsabou* stated:

> "Moersen was not required to have any specialized knowledge of the Catholic faith. Stated another way, his lack of knowledge of many aspects of the Catholic faith did not prevent him from doing his job. This is unlike the plaintiff in *Shaliehsabou*, who, without very specific training, would mot have been permitted to hold the position of Mashgiach, much less perform that role."

The Respondent held the positions of organist/pianist/keyboardist. The Respondent did not serve as a

spiritual leader. The Respondent did not serve in a supervisory or teaching capacity. The Respondent did not play a pivotal role in the church's music ministry but played a limited role under the supervision of the choir director. The Respondent's position is similar to the position of secular, lay, custodial, administrative or support staff. The Respondent was not the primary human vessel through whom St. Catherine Laboure chose to handle its music ministry. The Respondent's position with the Parish is not "pivotal" or "integral" to the music ministry but more analogous to the role of the translator referred to by the court in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003).

There is no confusion among the courts as to the application of the ministerial exception. In applying the "primary duties" test to other positions, other courts have reached a similar conclusion that some religious employees are not covered by the ministerial exception.

In *Weissman v. Emeth*, 38 F.3d 1038 (8th Cir. 1994), the court found that Weissman, who was employed as a temple administrator for a Jewish Temple, was not a member of the clergy. The court quoted *Demarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993), for the proposition that the mere fact that the employee may have some religious duties did not make the position ministerial.

Several courts have found that teachers of religious schools are not "ministers" under the ministerial exception. In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) and *Geary v. Visitation of The Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir.

1993), the courts have found that teachers at religious schools, who perform some religious functions or duties, do not fall into the ministerial exception.

In *Demarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993), the court found that the ADEA was applicable to a teacher of a Catholic School. Holy Cross argued that the ADEA was "inapplicable to claims brought by members of the clergy against their religious employers." The court however rejected the argument that teachers in the Catholic school were "clergy".

In *Demarco*, the court drew a distinction between cases in which the employer/employee relationship is so pervasively religious that no inquiry could be made without violating First Amendment principles and those involving lay or secular employees where limited inquiry could be made without violating First Amendment principles. *Id.*

Similarly, in *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993), the ADEA was applicable to a teacher of a Catholic school who performed some religious duties. The court stated that "notwithstanding Geary's apparent general obligation to be a visible witness to the Catholic Church's philosophy and principles, a court could adjudicate Geary's claims without the entanglement that would follow were employment of clergy or religious leaders involved." *Id.*

In *Dole v. Shenandoah Baptist Church, supra*, the court found that the Fair Labor Standards Act ("FLSA") applied to the teachers of a Church school. The Church

argued that the teachers were ministers covered by the ministerial exemption under FLSA. In the school, all classes were taught from a pervasively religious perspective and the teachers were required to lead the students in prayer and subscribe to the school's statement of faith as a condition of employment. After considering the factor of the "primary duties" test, the court found that the teachers were not ministers.

In *Dole*, the court distinguished that case from *Rayburn v. General Conference of Seventh-Day Adventist*, 722 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1010 (1986) where the claimant was a teacher at the church's theological seminary who was seeking appointment to the seven-person pastoral staff of one of the denomination' congregation. The *Dole* court stated that "[t]he teachers in the present case perform no sacerdotal functions; neither do they serve as church governors. They do not belong to any clearly delineated religious orders." *Id.* at 1396.

Clearly the Maryland Court of Appeals considered and correctly applied prior federal precedent's regarding the ministerial exception and this decision does not create a conflict warranting certiorari review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

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v.

WILLIAM T. MOERSEN,
Respondent.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page ii of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Respondent attempts to portray the issue in this case as a purely factual one—and to argue that the cases in which the ministerial exception were applied to persons in music ministry involved different facts. The question presented here, however, is not a factual one, but an important constitutional one: whether the ministerial exception applies to an organist who plays a visible role in a Church's liturgical services. There is an undeniable conflict among the courts on that question—and an undeniable conflict between the standard applied by the Court of Appeals in this case and the most frequently quoted standard for determining the applicability of the ministerial exception.

1. The prevailing view—first articulated by the United States Court of Appeals for the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986)—has been that the ministerial exception applies to one whose "primary duties consist of . . . participation in religious ritual and worship." The Court of Appeals held that the exception did not apply to precisely such a person. There was no dispute that Mr. Moersen's primary duties were to "participat[e] in religious ritual and worship": his principal duties were to select and perform all of the organ music at liturgical services,[1] and to provide the musical accompaniment for all of the hymns. There was also no dispute that, in the Court of Appeals' words, "Moersen's music [was] central to the church's method of worship." Yet the Court held that the ministerial exception did not apply. That result is squarely at odds with the *Rayburn* standard, which has itself been widely adopted.

It is no answer for Respondent to argue that the Court of Appeals cited and purported to apply the *Rayburn* standard. As noted in the Petition, the Court of Appeals misquoted *Rayburn*—omitting the critical reference that primary duties consisting of "participation" in religious worship were sufficient to trigger the ministerial exception. *See* Pet. 7–8. And, misquotation aside, the decision of the Court

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[1] Respondent states that he "did not plan or select the music associated with the worship at any of the liturgies." Brief in Opposition 3. But he ignores the affidavit he submitted to the Circuit Court, in which he acknowledged that his duties included "select[ing] whatever organ music that I performed." R. E49.

of Appeals in this case is irreconcilable with the *Rayburn* standard.

2. There is also a conflict between the decision of the Court of Appeals and the decisions of other courts faced with similar, albeit not identical, facts. *At least eight courts* have held that persons engaged in a Church's music ministry fall within the ministerial exception.[2] Until this case, *no court* had held to the contrary.

Moersen can argue that his role was more limited than the role of the plaintiffs in some or all of those cases. But the precise facts of those cases are less important than the broad principles that they apply—and the uniformity of results that they reach. Taken together, those cases establish a pattern from which the Court of Appeals' decision is a marked departure. It is impossible, for example, to reconcile the outcome of this case with the thoughtful analyses of Judge Wilkinson and Judge Posner in two relatively recent cases—*EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000), and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006).

As Judge Wilkinson explained in the *Diocese of Raleigh* case, an organist "play[s] a prominent role in worship services," sufficient to trigger application of the ministerial exception, "[e]ven where [she does] not select the music herself"—because "the subtle judgments that accompany the presentation and interpretation of sacred music contribute to its spiritual effect." 213 F.3d at 803. And as Judge Posner noted in *Tomic*, the sort of reasoning that was

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[2] See cases cited at pp. 16-18 of the Petition for a Writ of Certiorari.

persuasive to the Court of Appeals in this case—that "all [the organist] did was play music"[3]—overlooks the reality that how one plays the music "alter[s] the religious experience" of the congregation. 442 F.3d at 1040.

The differences in outcome between those cases and this case do not stem from any differences in the facts, but rather from a fundamental difference of opinion over how the law applies to the central fact that is common to all of these cases—namely, that an organist, though not the leader of the congregation, plays a direct and visible role in the liturgy that can significantly affect the quality of the church-goers' overall religious experience. Other courts have thought that is enough to trigger application of the ministerial exception. The Court of Appeals did not.

3. There is disagreement, more generally, over whether and to what extent an individual's duties must be supervisory to be considered "ministerial." The Court of Appeals appeared to conclude that a non-governance, non-teaching role is ministerial only if it is supervisory.[4] But that position would exclude Eucharistic ministers, lectors, cantors, altar servers and others who have highly visible roles in liturgical services.[5] Surely a Church has the right to decide for

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[3] *Compare* App. 19a ("All [Moersen] needed was knowledge of how to play an organ.").

[4] As it explained its result, "we simply are not convinced that [Moersen's] role was supervisory in any respect, involved any form of church governance, or directly required the teaching or the spreading of the religious faith." App. 17a.

[5] Obviously many such persons are volunteers, not employees, but discrimination laws are not limited to employment relationships. One can easily imagine a claim, for example, that a Church discriminates against girls in the selection of altar

itself who may serve in those capacities. What makes the organist's role—and the role of the cantor, for example—important to a Church is not that he supervises others whose work affects the congregation, but that the way he performs his function directly affects the congregation.

4. Contrary to the respondent's contention, recognizing that the organist has a ministerial function would not mean that "virtually every employee of the church would fall into the ministerial exception." Brief in Opposition 1. Many, if not most, Church employees do not play visible roles in the Church's liturgical services. Many, if not most, could perform their duties—or fail to perform them—without any detectible impact on the religious experience of the faithful. Not all could claim, as the Court of Appeals acknowledged of Mr. Moersen, that what they do "is central to the church's method of worship." App. 18a. There are lines that can be drawn here between those whose services are purely secular and those whose services are infused with religious significance.[6] Contrary to the Court of Appeals' observation, one need not include the organ tuner in the ranks of minister to recognize that the one who performs sacred music during Church services—often alone and at other times in concert with the congregation—plays an integral role in the religious life of the church.

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servers, or that a Church discriminates against older people in the selection of lectors.

[6] Courts have, in fact, drawn lines in other cases involving employees such as teachers and administrators. *See* Pet. 15, 19–21. The apparent inconsistency in results in some of these cases underscores the need for guidance from this Court.

5. The precise issue in this case is a recurring one, as evidenced by the number of reported cases raising the same issue. And the principles at stake are important ones, as Respondent concedes. Until now, there has been little reason for this Court to interfere in the continuing development of these principles in the state and federal appellate courts.[7] With the decision in this case, however—and the decision of the Second Circuit Court of Appeals in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), that the ministerial exception has been displaced by the Religious Freedom Restoration Act ("RFRA")[8]—uncertainty has been introduced, and the need for guidance from this Court has become apparent.

The decision of the Court of Appeals was wrong. It invites judicial interference in one of the most protected areas of religious freedom—the selection of those who perform liturgical functions. It conflicts with the decisions of other courts and with the prevailing standard for determining when the ministerial exception applies. It injects confusion into an important area of First Amendment law that for

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[7] Certiorari was denied in a series of cases in which the ministerial exception was applied. *See, e.g.*, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972).

[8] Certiorari was not sought in *Hankins*, because that decision resulted in a remand to the district court, which held that RFRA foreclosed a minister's age discrimination claim. *Hankins v. New York Annual Conf. of the United Methodist Church*, 516 F. Supp. 2d 225 (E.D.N.Y. 2007). That decision is now on appeal to the Second Circuit.

three decades had seemed reasonably clear. The decision, therefore, warrants review by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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